IN THE

Supreme Court of the United States

October Term, 1978

No. 78-110

SHEARN MOODY, JR.,

Petitioner,

vs.

STATE OF ALABAMA, EX R .L. CHARLES H. PAYNE, COMMISSIONER OF INSURANCE AND RECEIVER OF EMPIRE LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

SHEARN MOODY, JR.,

Petitioner,

vs.

STATE OF ALABAMA, EX REL. CHARLES H. PAYNE, COMMISSIONER OF INSURANCE AND RECEIVER OF EMPIRE LIFE INSURANCE COMPANY OF AMERICA, AND PROTECTIVE LIFE INSURANCE COMPANY, AN ALABAMA CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

LAW OFFICES OF FREDERICK J. LAWSON,
15233 Ventura Boulevard, Suite 414,
Sherman Oaks, Calif. 91403,
(213) 981-4100/872-3711,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1978

No. .....

SHEARN MOODY, JR.,

Petitioner,

vs.

STATE OF ALABAMA, EX REL. CHARLES H. PAYNE, COMMISSIONER OF INSURANCE AND RECEIVER OF EMPIRE LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

SHEARN MOODY, JR.,

Petitioner,

vs.

STATE OF ALABAMA, EX REL. CHARLES H. PAYNE, COMMISSIONER OF INSURANCE AND RECEIVER OF EMPIRE LIFE INSURANCE COMPANY OF AMERICA, AND PROTECTIVE LIFE INSURANCE COMPANY, AN ALABAMA CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Supreme Court of the United States:

The petitioner, Shearn Moody, Jr., prays that a Writ of Certiorari issue to review the Judgments and Opinion of the Supreme Court of Alabama that were rendered and entered on February 3, 1978, affirming, as modified, two civil contempt judgments of the Circuit Court of Jefferson County, Alabama, in the two cases described herein. The two cases (No. S.C. 2264 and No. S.C. 2453) were consolidated for hearing by the Alabama Supreme Court and were decided in a single Opinion of the Alabama Supreme Court.

I

OPINION BELOW.

The Opinion of the Supreme Court of Alabama is reported at 335 So.2d 1116. A copy of said Opinion is attached hereto as Appendix "A."

II

JURISDICTION.

The Judgment of the Supreme Court of Alabama sought to be reviewed herein was rendered and entered on February 3, 1978.

An Application for Rehearing was overruled by the Supreme Court of Alabama on March 24, 1978. A copy of the Notice of said overruling is attached hereto as Appendix "B."

Petitioner presented a timely Motion for Extension of Time Within Which to File a Petition for Writ of Certiorari in this Court to the Honorable Justice Lewis F. Powell, Jr., who signed an Order on June 14, 1978, extending the time for filing a Petition for Writ of Certiorari in this matter to July 20, 1978. A copy of this Order is attached hereto as Appendix "C."

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

III

QUESTIONS PRESENTED.

1. May a state court issue an injunction to prevent a litigant from asserting federal *in personam* rights in a federal court in view of this Court's holding in *Donovan v. Dallas,* 377 U.S. 408?

2. Is a civil contempt judgment valid and enforceable if based upon a state court order which violates the principle of law enunciated in *Donovan v. Dallas?*

IV

STATUTES INVOLVED.

42 U.S.C. §1983.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1985.

§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his prop-

erty so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice;
intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities

under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

V
UNITED STATES CONSTITUTION.

Article VI, Clause 2.

ARTICLE VI.—DEBTS VALIDATED. SUPREME LAW OF LAND

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in pursuance thereof;

and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

VI
STATEMENT OF THE CASE.

The narrow but very important issues in this case arose out of a local Alabama state court receivership proceeding and the subject civil contempt judgments are based upon the following set of facts:

1. In April, 1972, the State of Alabama filed a Complaint in an Alabama state court against Empire Life Insurance Company of America (hereinafter referred to as "Empire") and requested that said company be placed in receivership on the grounds that it was allegedly financially impaired and insolvent. Following a hearing thereon, Empire was placed in receivership by order of the state court entered on June 29, 1972, and the Commissioner of Insurance for the State of Alabama was named the receiver. Petitioner was the chief executive officer and largest shareholder of Empire.

2. It soon became apparent to petitioner, and others, that the local Alabama court receivership proceeding was a sham (involving bribery and corruption of state officials and judicial officers) and that the conduct of certain state officials, court agents, and Insurance Department officials constituted a violation of

federal anti-trust laws, and a serious violation of the constitutional and civil rights of the petitioner, and others. Because the enforcement and protection of petitioner's important constitutional and civil rights required the exercise of federal jurisdiction, the petitioner sought redress by lending encouragement and financial assistance to one Willie Allmon, an Empire policyholder, who filed a federal anti-trust and civil rights complaint (styled *Allmon v. Bookout, et al.*, Civil Act. No. 74-377-N (hereinafter "*Allmon* case")) in the United States District Court for the Middle District of Alabama. The Allmon complaint was filed as a class action on behalf of Empire policyholders on November 22, 1974, and was subsequently amended January 28, 1975.

3. On January 6, 1975, the local Alabama receivership court permanently restrained and enjoined petitioner (his officers, agents, servants, employees, and attorneys) and others from filing any lawsuit, complaint or legal claim, or any amendment to a complaint or legal claim, in any court, wheresoever located, against any person or legal entity, directly or indirectly related to, which may directly or indirectly affect certain persons, as individuals or as state agents. The Alabama state court order further permanently restrained and enjoined petitioner and others from enforcing their rights or remedies in any court of this country if said rights or remedies directly or indirectly affected Empire Life Insurance Company of America, its receivership, its receiver, or any written agreement between the receiver and Protective Life Insurance Com-

pany of Alabama (hereinafter referred to as "Protective"). Petitioner was prohibited from doing any of the above mentioned acts without first obtaining the permission of the Alabama state court. (App. D, Order of January 6, 1975.)

4. In July and August of 1976, the receiver of Empire and Protective Life Insurance Company, respectively, instituted legal proceedings in the Alabama court against petitioner and sought compensatory and punitive damages in excess of Two Million Dollars ($2,000,000) on the grounds that petitioner's alleged participation in the filing of the *Allmon* Amended Complaint on January 28 of 1975 constituted civil contempt and a violation of the Alabama court Order of January 6, 1975. (App. E and F, respondent's claims for damages.)

5. Petitioner responded to the receiver and Protective's claim for damages by denying, in his answers filed with the court, the enforceability of the subject January 6, 1975, Alabama court Order. Petitioner further denied in his answer the authority and jurisdiction of the Alabama court to enter such an order.

6. On December 3, 1976, the court entered a judgment against Petitioner and in favor of the receiver in the amount of One Hundred Thousand Dollars ($100,000), which judgment included Fifty Thousand Dollars ($50,000) in punitive damages. Thereafter, on motion filed by petitioner, the amount of said judgment was reduced to Eighty-Seven Thousand Dollars ($87,000) by order of the court. Petitioner appealed the judgment to the Alabama Supreme Court which on February 3, 1978, affirmed the judgment of the lower court "conditioned upon the filing by the receiver of a remittitur in this court in the amount of Eighteen Thousand Eight Hundred Eighty-Four Dollars and Twenty-Two Cents ($18,884.22) . . ." (App. A, Opinion of the Alabama Supreme Court.) Such remittitur was filed on behalf of the receiver, resulting in final judgment against Petitioner in the amount of Sixty-Eight Thousand One Hundred Fifteen Dollars and Seventy-Eight Cents ($68,115.78). (App. G, Remittitur.)

7. With respect to Protective's claim for damages against petitioner, the Alabama lower court on November 16, 1976, entered judgment against petitioner in the amount of One Hundred Seventy-Six Thousand and Eight Dollars ($176,008), of which One Hundred Thousand Dollars ($100,000.00) constituted punitive damages. (App. H, Findings of Fact and Conclusions of Law; App. I, Judgment and Decree.)

Thereafter, petitioner appealed the judgment to the Alabama Supreme Court, which court affirmed the judgment but corrected and modified it to the sum of One Hundred Sixty-Five Thousand Two Hundred Twenty-Eight Dollars and Fifty Cents ($165,228.52). (App. A, Opinion of the Alabama Supreme Court.)

8. The Alabama Supreme Court consolidated petitioner's appeal of both the Receiver and Protective judgments. In his appeal to the Alabama Supreme Court, the petitioner again challenged the enforceability of the January 6, 1975, state court injunction, and the jurisdiction and authority of the state court to enter such an order. In his Brief and Argument of Appellant to the Alabama Supreme Court, petitioner cited this Court's decision in *Donovan v. Dallas* (377 U.S. 408 (1964)) in support of his argument that a state court was without authority and jurisdiction to enjoin a federal court *in personam* action.

REASONS FOR GRANTING THE WRIT.

The subject Alabama state court injunction of January 6, 1975, and the civil contempt judgments based thereon are in direct conflict and in violation of the supremacy clause of the United States Constitution. Furthermore, said injunction and judgments are in direct violation of the important legal and constitutional principles enunciated by this Court in *Donovan v. City of Dallas*, 377 U.S. 408 (1964), and *General Atomic Company v. Felter*, ... U.S. ....., 98 S.Ct. 76, 54 L.Ed.2d 199 (1977).

I

The fundamental legal principle expressed in the *Donovan* and *General Atomic* cases provides that "State courts are completely without power to restrain federal-court proceedings in *in personam* actions" (377 U.S. at 413; 98 S.Ct. at 78). The right to litigate in federal courts is granted by Congress and cannot be infringed or impaired by state courts. The Supremacy Clause of the United States Constitution clearly protects individuals from such infringement or impairment by state courts.

The facts in the case at bench are directly analogous to those presented to the United States Supreme Court in the *Donovan* case.

In *Donovan*, the Texas Court of Civil Appeals properly refused to enjoin plaintiffs from prosecuting a case in the United States District Court on the grounds that it was *without power to enjoin litigants from prosecuting an action in a federal court*. The Supreme Court of Texas, however, erroneously reversed this ruling and required the Court of Civil Appeals to issue a Writ remarkably similar to the state court in-

junction which is at issue in the case at bench. Said Writ prohibited the litigants in the United States District Court from any further prosecution of that case and enjoined them as follows:

> ". . . from filing or instituting any further litigation, lawsuits or actions in any court the purpose of which is to contest the validity of the airport revenue bonds . . . or from in any manner interfering with . . . the proposed bonds. . . ." (*Ibid.* at p. 410.)

As in the case at bench, the federal court in the *Donovan* case dismissed the case pending there, and the state court in *Donovan* found plaintiffs in contempt for participating in the federal district court proceedings and imposed substantial fines and jail sentences against several of the plaintiffs.

The subject order of January 6, 1975, is almost identical to the *Donovan* order and provides as follows:

> "It is ORDERED, ADJUDGED and DECREED that
>
> (1) any and all policyholders, stockholders and agents, present or former, of Empire Life Insurance Company of America, and
>
> (2) Shearn Moody, Jr., his officers, agents, servants, employees and attorneys (including, but without limitation, Donald L. Collins, A. Eric Johnston, Dale R. Major, Scott E. Manley, A. R. Schwartz, and Thomas R. Beech), and those persons in active concert or participation with any of the foregoing be permanently restrained and enjoined from filing, financing, sponsoring, initiating, or aiding, in whole or in part, in any way the filing of any lawsuit, complaint or legal claim,

or any amendment to any complaint or legal claim in any court wheresoever located on behalf of any party whatsoever against:

(1) John G. Bookout, as an individual;

(2) John G. Bookout as Receiver of Empire Life Insurance Company of America, his officers, agents, employees and attorneys;

(3) the Ancillary Receivers of Empire Life Insurance Company of America, their officers, agents, employees and attorneys;

(4) Protective Life Insurance Company, its officers, agents, employees and attorneys; or

(5) any other person or legal entity which lawsuit or claim relates to or affects directly or indirectly:

(a) the affairs of Empire Life Insurance Company of America;

(b) its receivership;

(c) its Receiver;

(d) the Treaty of Assumption and Bulk Reinsurance, as amended, between the Receiver and Protective Life Insurance Company; or

(e) the implementation of any order or decree of this Court in this proceeding,

unless such policyholders, stockholders or agents or said Shearn Moody, Jr., his officers, agents, servants, employees and attorneys and those persons in active concert or participation with them shall first receive the prior approval of this Court."

The United States Supreme Court in *Donovan* vacated the contempt judgment against plaintiffs on the grounds that the state court injunction was invalid.

In so ruling the United States Supreme Court declared as follows:

> "We think the Texas Court of Civil Appeals was right in its first holding that *it was without power to enjoin these litigants from prosecuting their federal-court action*, and we therefore reverse the state's Supreme Court judgment upsetting that of the Court of Appeals. We vacate the later contempt judgment of the Court of Civil Appeals, which rested on the mistaken belief that the Writ prohibiting litigation by the federal plaintiffs was 'valid.' (Emphasis added, 377 U.S. 408 at 411-412.)

As in the *Donovan* case, the petitioner herein was cited and adjudicated in civil contempt by the Alabama state court for attempting to exercise his federally guaranteed rights by participating in the *Allmon in personam* federal court action in the United States District Court pursuant to 42 U.S.C. 1981, *et seq.* Although the United States Supreme Court in *Donovan* recognized certain rare exceptions to the rule, the Court declared:

> "While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that *state courts are completely without power to restrain federal court proceedings in in personam actions* like the one here." (Emphasis added, 377 U.S. 408, at 412-143.)

The Court continued by declaring:

> "And it does not matter that the prohibition here was addressed to the parties rather than to the federal court itself." (377 U.S. 408 at 413.)

The court in *Donovan* very clearly and expressly declared that a state court may not punish a federal court litigant for pursuing his right to federal court remedies. Referring to a litigant's important right of access to federal court remedies, the Court declared:

> "That right was granted by Congress and cannot be taken away by the State. The Texas courts were without power to take away this federal right by contempt proceedings or otherwise." (377 U.S. 408, at 413-414.)

In the case at bench, petitioner has been seriously punished by both criminal and civil penalties for violations of an invalid state court injunction which prohibited petitioner from exercising his federal court remedies. Stated more simply, petitioner and others have been severely punished for disobeying an *invalid order*.

Addressing itself to this very issue, the United States Supreme Court declared in *Donovan* as follows:

> "Since we hold the order restraining petitioners from prosecuting their case in the federal courts was not valid, but was invalid, petitioners have been punished for disobeying an invalid order."

Because of the invalidity of the subject court order in *Donovan* the United States Supreme Court reversed the contempt judgment on the very grounds raised by the petitioner herein.

II

The conduct for which petitioner was held in contempt (and severely penalized by imprisonment and judgment in excess of Two Hundred Thousand Dollars ($200,000)) was petitioner's alleged participation and financial support of a federal anti-trust and civil rights action in a United States District Court. The action

was instituted by one Willie Allmon, as a policyholder of Empire. The federal action was styled *Willie Allmon, etc. v. John G. Bookout, et al.*, Civil Act. No. 74-377-N (U.S. District Court for the Middle District of Alabama). The *Allmon* case was a class action on behalf of Empire policyholders for declaratory judgment, injunctive relief, and damages authorized by Title 28, United States Code, Sections 2201 and 2202, and Title 42, United States Code, Sections 1983 and 1985, the due process and equal protection clauses of the Fourteenth Amendment and the contract clause of Article I, Section 10, of the Constitution of the United States. Jurisdiction of the federal court was based upon Title 28, United States Code, Section 1343 (Civil Rights) and other appropriate federal jurisdictional grounds, including Title 28, United States Code, Section 1331 (Federal Questions) and Section 1332 (Diversity of Citizenship).

The constitutionality of several sections of the Code of Alabama were challenged on their face and as applied and the conduct of several state officials, court agents, and individuals was challenged as constituting a deprivation of the constitutional and civil rights of policyholders of Empire. The conduct of said state and court officials and other individuals included serious allegations of unlawful and improper conduct by public officials in accepting bribes and other forms of personal pecuniary benefit; improper and unlawful *ex parte* communications and corruption within the Alabama judiciary and Department of Insurance; an unlawful and cleverly devised scheme, plan and conspiracy between state officials to obtain substantial sums of monies in the form of payoffs, bribes, and other corrupt practices in violation of state and federal law; and other

serious violations of public trust and federal anti-trust laws.

The *Allmon* case was clearly an *in personam* federal court proceeding. Although the Alabama State Court receivership proceeding was an *in rem* action in a state court, it has uniformly been held that a federal court may hear an *in personam* action even though it involves issues that also may be present in a prior *in rem* action in a state court, and the state court cannot enjoin it from doing so. (See 14 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 19-22 (1976).)

A case in point is *Mills v. Roanoke Industrial Loan & Thrift,* 70 F.R.D. 448 (W.D.Va. 1975). In the *Mills* case a company had been placed in a receivership in a state court, and, as in the case at bench, an order of that state court enjoins all persons from prosecuting suits against the company without first obtaining permission from the court. Suit was then brought in federal court against the company, its former officers, and the receivers for violations of the securities laws. The federal court held that as a matter of comity permission should have been sought before instituting the federal action, however, there was no jurisdictional bar to the federal suit. In so ruling, the federal court declared as follows:

> "When one suit is *in rem,* as is the receivership proceeding in state court, and the other suit is *in personam,* it is equally well established that each court may exercise its concurrent jurisdiction independently of the other . . . under such circumstances, the *state court could not enjoin plaintiffs from asserting their federal causes of action.*" (Emphasis added, 70 F.R.D. 448 at 451.)

The *Mills* court further declared that the fact that the federal suit would potentially affect the amount of funds in the hands of the receivers was irrelevant. The federal court refused to abstain in favor of the state court. (70 F.R.D. 448 at 451-452.)

III

As stated earlier, the federal court proceeding in the *Allmon* case was a proper exercise of federal remedies by the plaintiff and other participating parties and could not be properly enjoined by a state court injunction. In fact, the federal court was the only forum available in which the petitioner, and other policyholders could obtain redress for deprivation of their constitutional and civil rights. Furthermore, federal courts have exclusive jurisdiction for violation of federal anti-trust laws.

Justification for this very important right of access to the federal courts was described by the United States Supreme Court in *Mitchum v. Foster,* 407 U.S. 225, as follows:

> "The very purpose of Section 1983 was to interpose the federal courts between the states and the people as guardians of the people's federal rights, to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial!" (407 U.S. 225 at 242.)
>
> "This proposition has been uniformly followed by the courts of appeal and district courts in decisions both preceding and subsequent to *Mitchum v. Foster.*" *(Ibid.)*

For example, in *Kern v. United States District Court* (CA Cal. 1975), 511 F.2d 192, aff'd, 426 U.S. 394, 96 S.Ct. 219, 48 L.Ed.2d 725, it was declared that the primary purpose of Section 1983 is to vindicate federal rights against a state action. (See also *Luker v. Nelson* (DC Ill. 1972), 341 F.Supp. 111.) Similarly, in *Dahl v. Palo Alto,* the court declared that in enacting Section 1983, Congress was *providing a forum and a remedy* for litigants whose civil rights were being violated, but who could get no relief in courts or agencies of their states.

It is important to note that Section 1983 is intended to provide a *federal remedy* that is supplementary to state remedies which need not be first sought and refused before the federal one in invoked. (*Moreno v. Henckel* (CA Tex. 1970), 431 F.2d 1299.

Thus, it is clear that petitioner, Willie Allmon, and others in the *Allmon* case had a federally created right to bring suit in the federal court under 42 U.S.C. Section 1981, *et seq.*, and that the Alabama state court had no power or authority to prohibit them from doing so.

Conclusion.

In the criminal contempt proceedings, referred to above (*Shearn Moody, Jr. v. State of Alabama,* 351 So.2d 552) and which also arose out of the January 6, 1975, Order, petitioner raised the *Donovan* principle of law in challenging the validity and enforceability of the subject January 6, 1975, state court injunction.

The Alabama Supreme Court avoided the clear application of *Donovan* by ruling that the *Allmon* federal anti-trust and civil rights case was in *in rem* proceeding and therefore not within the application of *Donovan.* Clearly, the *Allmon* case, and any other federal anti-trust and civil rights action, is *NOT* an *in rem* action, but rather an *in personam* action in one of its purest forms.

The *Donovan* principle is mandatory and must be applied uniformly by all state courts. This Court cannot allow state courts to exercise the awesome power of injunction to prohibit access to our federal courts and thus deprive litigants of the sanctuary of our federal system of constitutional and statutory protections.

Although the *Donovan* principle was again raised by petitioner in the civil contempt judgment cases, which are the subject of the case at bench, the Alabama Supreme Court ignored the *Donovan* issue in its written Opinion and, instead, addressed itself solely to other unrelated issues. Thus, the Alabama Supreme Court has demonstrated that unless this Court grants Certiorari, it shall consider the application of *Donovan* as discretionary, and in matters of local political administrative and judicial corruption and civil rights deprivations, a litigant shall be left only with his state court remedies.

The summary reversal by the United States Supreme Court of the state court injunction in the recent *General Atomic v. Felter* case (which affirmed *Donovan*) emphasizes this Court's continuing efforts to protect access to the federal courts to litigants with *in personam* federal causes of action. The subject injunction in the case at bench is a blatant example of a state

court's attempt to avoid the Supremacy Clause principles. The state court's challenge to those principles should not be ignored, and the petitioner's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF FREDERICK J. LAWSON,
By FREDERICK J. LAWSON,
Attorney for Petitioner.

APPENDIX A.

The State of Alabama—Judicial Department.

The Supreme Court of Alabama. October Term, 1977-78.

Shearn Moody, Jr. v. State of Alabama, Ex Rel. Charles H. Payne, Commissioner of Insurance and Receiver of Empire Life Insurance Company of America, S. C. 2453, and Shearn Moody, Jr. v. State of Alabama, Ex Rel. Charles H. Payne, Commissioner of Insurance and Receiver of Empire Life Insurance Company of America, & Protective Life Insurance Company, an Alabama Corporation, S.C. 2264, Appeal from Jefferson Circuit Court.

JONES, JUSTICE.

These cases, consolidated before the Court, seek review of two decrees of the Jefferson County Circuit Court awarding damages to Protective Life Insurance Company and the Commissioner of Insurance for the State of Alabama. The proceedings below arose because of Appellant's, Shearn Moody, Jr.'s, continued violation of an injunction.

When Empire Life Insurance Company became undercapitalized, it was placed in receivership and reinsurance was approved through Protective. Moody, as Empire's president and principal stockholder, refused to accede to such reinsurance and filed several suits to prevent and harass the receivership action. See, e.g., *Allmon v. Bookout,* Civ. Act. No. 74-377-N, United States District Court for the Middle District of Alabama. The Commissioner obtained an injunction on January 6, 1975, to prevent the filing of new suits or the amendment of any pending causes concern-

ing Empire's receivership. Moody's continued violation of this injunction, and other orders of the trial Court, and his attempts to circumvent the Court's authority, have led to citations for both civil and criminal contempt. *Moody v. State, ex rel. Payne* ..... So.2d ..... [Ms. S. C. 2265, September 9, 1977]; *Moody v. State, ex rel. Payne,* ..... So.2d ..... [Ms. S. C. 2215, September 9, 1977]; *Ex parte Moody,* ..... So.2d ..... [Ms. S. C. 2336-39, September 19, 1977]; *Moody v. State, ex rel. Payne,* 344 So.2d 160 (Ala. 1977); and *Moody v. State, ex rel. Payne,* 295 Ala. 299, 329 So.2d 73 (1976).

On July 30, 1976, subsequent to related hearings, the Commissioner as Receiver of Empire, filed his petition seeking recovery for damages incurred by Moody's willful violation of the January 6 injunction. Service was obtained by mailing copies of the petition to Moody's attorneys of record in the receivership proceeding. No personal service upon Moody was attempted.

Trial began on November 29, 1976, and the jury returned a verdict assessing compensatory damages in the amount of $50,000 and punitive damages in an equal amount. The trial Court ordered remittitur in the amount of $13,000 and entered judgment.[1]

The second of the two cases, consolidated herein, began on August 19, 1976, when Protective filed its claim seeking compensatory and exemplary damages occasioned by Moody's contemptuous acts. As in the Commissioner's suit, service was obtained only upon Moody's attorneys of record.

---

[1]The trial Court's order is explicit in relating the remittitur to the award of compensatory damages.

Because of Moody's failure to respond to Protective's discovery efforts, a default judgment was entered on October 19. At that time, pursuant to Rule 55, ARCP, the Court set a date for a non-jury determination of damages. The Court awarded compensatory damages of $36,508 and punitive damages of $100,000. Additionally, attorney fees incurred in the civil contempt proceedings, in the sum of $32,000, were awarded; and $7,500 was awarded as attorneys' fees in the criminal contempt proceedings. It is in this posture, then, that these two suits come before us.

I.

The controlling question, raised in both cases, concerns whether a party who sustains damages as a result of another's contemptuous acts may recover for his damages without instituting a separate action. We recently considered this question in *Lightsey v. Kensington Mortgage and Finance Corp.*, 294 Ala. 281, 315 So.2d 431 (1975). After discussing the law of other jurisdictions, *Lightsey* held that where there is a violation of a valid restraining order, and such violation proximately results in damages to the aggrieved party, such injured party is not without remedy. Our holding in *Lightsey* stated the procedure to be followed:

> ". . . we do not see the necessity of requiring the aggrieved party in such instance to pursue his remedy in another suit; but . . . we believe either party on demand would be entitled to a jury trial on the issue of damages. We perceive of no reason why this cannot be afforded in the same proceeding on petition of the aggrieved party seeking damages after a finding by the trial court that the opposite party is in contempt. A

jury would be impaneled to hear the evidence on such petition and determine whether damages, compensatory or punitive, should, under the usual rules, be imposed." 294 Ala., at 288.

Thus, we specifically held that the damages hearing is part of the main proceeding. Because this is true, and as is shown by our holding quoted above, the Alabama Rules of Civil Procedure apply to the damages hearing. It is equally clear, pursuant to Rule 5(b), ARCP, that *in personam* jurisdiction, having once been obtained in the original proceeding, need not be re-established. (In this case, *in personam* jurisdiction was obtained by Moody's intervention in the receivership action.)

Moreover, logic and the integrity of our court system dictate that, having once submitted himself to the jurisdiction of this State, Moody cannot prevent application of legitimate orders of this State's courts by merely absenting himself to some foreign jurisdiction. See *Ex parte Moody*, supra. Therefore, the Court had jurisdiction over this cause, and service was properly obtained upon Moody's attorneys of record. *State, ex rel. Brubaker v. Pritchard*, 236 Ind. 222, 138 N.E.2d 233 (1956); *Caplow v. Eighth Judicial District Court*, 72 Nev. 265, 302 P.2d 755 (1956); and 17 Am.Jur.2d, *Contempt*, § 87.

II.

Thus viewed, we must now determine whether it is proper to include attorneys' fees as part of the compensatory award. Moody's contention that these attorneys' fees are not recoverable is fallacious; and this for the reason that, as a proximate result of Moody's contempt, both Appellees have been forced to expend

large sums of money in the defense of illegal suits and in the investigation and prosecution of the contempt proceedings.

As a general rule, and in the absence of contractual or statutory provisions, attorneys' fees are not recoverable either as costs of litigation or as an element of damages. *State v. Alabama Public Service Commission*, 293 Ala. 553, 307 So.2d 521 (1975); *Hartford Accident & Indemnity Co. v. Cosby*, 277 Ala. 596, 173 So.2d 585 (1965); and *Taylor v. White*, 237 Ala. 630, 188 So. 232 (1939). There are, however, a number of exceptions to this general rule. One widely-accepted exception, and one which we specifically accept, is that in proper circumstances a reasonable attorney's fee may be allowed the prevailing prosecuting party in a civil contempt proceeding. This award, though not mandatory, is allowed within the sound discretion of the trial Court. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923); *Arvin, Inc. v. Sony Corp. of America*, 215 Va. 704, 213 S.E.2d 753 (1975); and 43 A.L.R.3d 793-97.

The purpose of this rule is to afford an injured party remedial relief for injuries sustained by him from the contemnor's contemptuous acts.[2] We can perceive no set of circumstances more fully justifying this exception than the case before us. For these reasons, and because the trial Court did not abuse its discretion in this regard, attorneys' fees incurred in the civil contempt proceedings are properly recoverable as an element of damages in the instant action.

---

[2]The necessity of relief of this type has been most recently acknowledged in *Cook v. Ochsner Foundation Hospital*, (Ms. 75-3982, United States Court of Appeals, Fifth Circuit, September 16, 1977.)

As we stated in *Ex parte Moody*, supra, however, no attorneys' fees are recoverable in *criminal* contempt proceedings. Therefore, the $7,500 awarded as attorneys' fees for the criminal contempt proceeding, recovered by Protective, must be disallowed.

Having determined that attorneys' fees are recoverable as an element of damages in civil contempt proceedings, we turn now to the more difficult question: Whether the judgment was supported by adequate evidence. The only damages recoverable are those proximately resulting from Moody's contemptuous acts—i.e., his violations of the January 6 injunction. These include both damages resulting from the defense of the *Allmon* action, including its appeal, and those incident to the civil contempt proceeding itself.

III.

Initially, we will address contentions raised by Moody concerning Protective's action. As Moody correctly points out, the trial Court made mathematical errors in calculating the appropriate recoveries. It is axiomatic that we are authorized to correct such mistakes and adjust the recovery accordingly. See *Jones v. Gladney*, 339 So.2d 1019 (Ala. 1976).

By multiplying the total number of hours worked, by the appropriate hourly rate, the maximum sum recoverable is $34,774.50—not $36,508. Similarly, the award of $32,000 for the contempt proceedings must be reduced to $30,454. Thus, the trial Court's award of damages must be reduced by a total of $3,279.50 due to mathematical errors.

Moody further contends that, because the Receiver has previously paid Protective $8,000, the judgment should be reduced by this amount. This question, however, is one properly between the Receiver and Protective. Moreover, the danger of double recovery was effectively eliminated by the trial Court's charge to the jury in the Receiver's suit.

Moody also argues that, because the original complaint in *Allmon* was filed prior to the January 6 injunction, the only damages recoverable are those incurred in directly opposing the *Allmon* amendment. This argument is without merit because, for all practical purposes, *Allmon* had been effectively dismissed prior to the filing of the amended complaint. Therefore, the *Allmon* action is almost entirely predicated upon the amended complaint, and the damages incurred proximately result from it.

Similarly, Moody asserts that the amounts expended in the *Allmon* appeal are not recoverable because this was not specifically proscribed by the January 6 injunction. As stated, however, *Allmon* was based almost entirely upon the amended complaint and, therefore, the appeal was merely an extension of the contemptuous act. Moreover, to hold otherwise would be to punish certain acts, while rewarding others which foster the very result proscribed. Clearly, the law is not so inane. Moody's acts were in continuous contemptuous disregard of the trial Court's orders.

We hold that the damages, as reduced and corrected, are properly allowable. Therefore, the judgment in Protective's action, as corrected, in the sum of $165,228.50, is affirmed and the cause is rendered.

IV.

In the Receiver's suit, the jury awarded $50,000 in compensatory damages. The remittitur effected a reduction to $37,000. The Commissioner only claimed

attorneys' fees and expenses. Though the evidence shows a reduction in value to the policyholders, these damages were not claimed in the complaint. The only other damages shown to have been incurred relate to attorneys' fees and certain expenses incident thereto. Upon this Court's thorough examination of the record, it is apparent that the evidence does not fully support the compensatory award of $37,000; however, the evidence does support $16,844.00 in attorneys' fees and $1,271.78[2] as expenses, for a total award of $18,115.78. Therefore, our affirmance is conditioned upon the filing by the Receiver of a remittitur in this Court in the amount of $18,884.22 within 30 days hereof. Otherwise, this cause will be reversed and remanded for a new trial on the issue of damages.

V.

The question of whether punitive damages are recoverable was answered in the affirmative by ***Lightsey.*** The fact that it may punish the particular defendant does not render this award violative of the criminal contempt statute (Tit. 13, §§ 9, 143, Code) because it is well settled that exemplary damages are not to be equated with criminal punishment. Moreover, in the absence of excessiveness so as to indicate prejudice or passion, the amount of such damages is within the sound discretion of the trier of fact. *Trahan v. Cook,* 288 Ala. 704, 265 So.2d 125 (1972); ***Badgett*** *v. McDonald,* 53 Ala.App. 726, 304 So.2d 228 (1974); and *Williams v. Clark,* 50 Ala.App. 352, 279 So.2d

[2]In fact, a substantial portion of this latter figure of $1,271.78 also represents attorneys' fees paid by the Receiver pursuant to a court order for reimbursement of attorneys' fees incurred by a court-appointed insurance reorganization consultant who was a named defendant in the *Allmon* action.

523 (1973). For these reasons, the punitive awards will not be altered.

Conclusion

Shearn Moody, Jr., continuously disobeyed orders of the trial Court and, therefore, was held in civil contempt. We have held in *Lightsey* that those who successfully prosecute such contempt proceedings may recover compensatory and punitive damages occasioned by the contemptuous acts. Save the above-noted exceptions, the evidence supports the judgments of the trial Court. Thus, we affirm the judgment in favor of Protective, as corrected; and we affirm the judgment in favor of the Receiver, subject to the filing of a remittitur in its action, as set out above. Unless the Receiver files a remittitur in the above-stated amount within 30 days from this date, the judgment will be reversed and the cause remanded.

In each case, costs of appeal will be taxed to the Appellee; moreover, neither Appellee is entitled to the 10 per cent penalty under § 12-22-72, Code 1975. In Protective's suit, it must be recognized that "[w]hen a judgment is corrected and affirmed on appeal, with any substantial change in the amount or terms of the judgment, favorable to the appellant, the costs of appeal are automatically cast upon the appellee. . . ." *Western Union Telegraph Co. v. Bashinsky, Case & Co.,* 217 Ala. 661, 666, 117 So. 289 (1928); See also *Ex parte General Mutual Insurance Co.,* 285 Ala. 445, 233 So.2d 230 (1970). Furthermore, § 12-22-72, Code 1975, is not applicable in circumstances such as this. *Chapman v. Rivers Construction Company Inc.,* 284 Ala. 633, 227 So.2d 403 (1969); and *New York Life Insurance Co. v. Reese,* 201 Ala. 673, 79 So. 245 (1918).

As to the Receiver's action, if the remittitur is duly filed, the judgment will stand affirmed. Without the provision of the remittitur statute, the judgment would have had to be reversed because of the excessive award. In this light, Appellant Moody was the successful party in the appeal. *Ex parte General Mutual Insurance Company,* supra. For this reason, the 10 per cent penalty is not to be assessed, and the Receiver will be taxed with the applicable costs. See *Williams v. Williams,* 283 Ala. 292, 216 So.2d 181 (1968); and *City of Anniston v. Douglas,* 250 Ala. 367, 34 So.2d 467 (1948).

AFFIRMED, AS CORRECTED, AS TO PROTECTIVE. AFFIRMED CONDITIONAL AS TO THE RECEIVER.

Torbet, C. J., Maddox, Shores, and Beatty, JJ., concur.

APPENDIX B.

Office of
Clerk of the Supreme Court
State of Alabama
Montgomery

RE: SC 2264 & SC 2453

Shearn Moody, Jr., Appellant vs. State of Alabama, ex rel. Charles H. Payne, et al., Appellee.

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today: Application for rehearing overruled. No opinion written on rehearing.
MARCH 24, 1978

/s/ [Illegible]
Clerk, Supreme Court of Alabama

APPENDIX C.

Order Extending Time to File Petition for Writ of Certiorari.

Supreme Court of the United States.

Shearn Moody, Jr., Petitioner, v. Alabama, Etc., et al. No. A-1048.

Upon Consideration of the application of counsel for petitioner.

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 20, 1978.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 14th day of June, 1978.

APPENDIX D.

Order and Injunction.

In the Circuit Court of Jefferson County, Equity Division.

State of Alabama, ex rel. John G. Bookout, Commissioner of Insurance, Plaintiff, vs. Empire Life Insurance Company of America, an Alabama corporation, Defendant, and Shearn Moody, Jr., Intervenor. Civil Action No. 171-687.

This matter was heard this 6th day of January, 1975 on the application of John G. Bookout, as Receiver of Empire Life Insurance Company of America, for an injunction against Shearn Moody, Jr. and others, a temporary restraining order having been previously issued on said application on December 27, 1974. On the basis of evidence adduced at said hearing, this Court is convinced that a permanent injunctive order should be entered as follows pursuant to this Court's general equity authority and the specific statutory authority contained in Title 28A, §624, Code of Alabama 1940, as amended:

It is ORDERED, ADJUDGED and DECREED that

(1) any and all policyholders, stockholders and agents, present or former, of Empire Life Insurance Company of America, and

(2) Shearn Moody, Jr., his officers, agents, servants, employees and attorneys (including, but without limitation, Donald L. Collins, A. Eric Johnston, Dale R. Major, Scott E. Manley, A. R. Schwartz, and Thomas R. Beech),

and those persons in active concert or participation with any of the foregoing be permanently restrained

and enjoined from filing, financing, sponsoring, initiating, or aiding, in whole or in part, in any way the filing of any lawsuit, complaint or legal claim, or any amendment to any complaint or legal claim in any court wheresoever located on behalf of any party whatsoever against:

(1) John G. Bookout, as an individual;

(2) John G. Bookout as Receiver of Empire Life Insurance Company of America, his officers, agents, employees and attorneys;

(3) the Ancillary Receivers of Empire Life Insurance Company of America, their officers, agents, employees and attorneys;

(4) Protective Life Insurance Company, its officers, agents, employees and attorneys; or

(5) any other person or legal entity

which lawsuit or claim relates to or affects directly or indirectly:

(a) the affairs of Empire Life Insurance Company of America;

(b) its receivership;

(c) its Receiver;

(d) the Treaty of Assumption and Bulk Reinsurance, as amended, between the Receiver and Protective Life Insurance Company; or

(e) the implementation of any order or decree of this Court in this proceeding,

unless such policyholders, stockholders or agents or said Shearn Moody, Jr., his officers, agents, servants, employees and attorneys and those persons in active

concert or participation with them shall first receive the prior approval of this Court.

DONE this 6th day of January, 1975.

/s/ [illegible] Barber
Circuit Judge

APPENDIX E.

Amendment to Petition for Damages.

In the Circuit Court of Jefferson County, Equity Division.

State of Alabama, ex rel. John G. Bookout, Commissioner of Insurance, Plaintiff, vs. Empire Life Insurance Company of America, an Alabama Corporation, Defendant and Shearn Moody, Jr., Intervenor. Civil Action No. 171-687.

Comes now Charles H. Payne, Commissioner of Insurance, State of Alabama, as Receiver of Empire Life Insurance Company of America and amends that Motion for Damages heretofore filed on the 5th day of June, 1975, pursuant to that order of this Court entered April 30, 1975, affecting the contempt of Shearn Moody, Jr., Intervenor, to request as damages, compensatory and punitive, the amount of One Million Dollars ($1,000,000.00). As grounds for said amendment and the request for such damages you Receiver would state to this Honorable Court the following:

1. That Shearn Moody, Jr. on January 6, 1975, was enjoined by this Court from filing or amending any further actions affecting the Receivership estate.

2. Thereafter the said Shearn Moody, Jr. did cause an amendment to be filed to that action entitled *Allmon vs. Bookout, et al.*, Civil Action No. 74-377 N pending in the United States District Court, Middle District of Alabama.

3. That, as a consequence thereof, the said Shearn Moody was on to-wit: the 30th day of April, 1975, found in contempt by this Court and ordered to take

whatever action may be necessary to withdraw or cause to be withdrawn any and all support, aid or assistance which the said Shearn Moody has provided or continues to provide to any of his agents, servants, employees, or attorneys in said action were invited to petition from time to time, and is now set for July 19, 1976.

4. That Petitioner, Charles H. Payne, did thereafter file a petition for compensatory damages consisting of legal fees paid in defense of the Allmon action January 6, 1975, through the date of April 30, 1975.

5. On information and belief, your Petitioner, Charles H. Payne alleges that said Shearn Moody, Jr. did subsequent to April 30, 1975, continue to finance, assist, aid, and encourage the said Allmon action by employment of Montgomery attorneys in the firm of Jones, Murray, Stewart, and Yarbrough, and that the said Shearn Moody, Jr. did retain and pay expenses of Indiana counsel by the name of Scott E. Manley, and New York counsel by the name of Martin Paul Solomon and Birmingham counsel by the name of Edward Still.

6. That as a result of the continued actions of Shearn Moody, Jr. in the Allmon action terminating most recently in a hearing before the United States District Court for the Middle District on May 14, 1976, with said cause being dismissed by order dated June 28, 1976, has been caused to expend great sums of the Receivership estate for legal fees and expenses.

WHEREFORE PREMISES CONSIDERED, your Receiver hereby amends his Petition for Damages heretofore filed and requests that this Court will by ancillary proceedings award to him for the benefit of the Re-

ceivership of Empire Life Insurance Company of America the sum of One Million Dollars ($1,000,000.00) as compensatory and punitive damages.

/s/ James W. Webb
James W. Webb
Attorney for Petitioner

James W. Webb
Attorney at Law
138 Adams Avenue
Montgomery, Alabama 36104

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Amendment to Request for Damages on Frank Newman, Richard James Stephens, Edward L. Ramsey, Drayton N. James, Stephen Trimmier, William Mills, and Drayton Nabers, Jr. by placing a copy of the same in the United States mail, postage prepaid, to each individually.

This the 15th day of July, 1976.

/s/ James W. Webb
James W. Webb
Attorney for Petitioner

APPENDIX F.

Claim for Compensatory and Exemplary Damages Against Shearn Moody, Jr.

In the Circuit Court for the Tenth Judicial Circuit of Alabama, Equity Division.

State of Alabama, ex rel. John G. Bookout, Commissioner of Insurance, Plaintiff, vs. Empire Life Insurance Company of America, an Alabama Corporation, Defendant, Shearn Moody, Jr., Intervenor. Civil Action No. 171-687.

Filed: August 19, 1976.

Comes now Protective Life Insurance Company ("Protective"), for itself and on behalf of those persons who held policies of insurance with Empire Life Insurance Company of America ("Empire"), whose policies of insurance were assumed by Protective pursuant to that certain Treaty of Assumption and Bulk Reinsurance approved by the Court herein on or about June 14, 1974 (hereinafter "Protective's Empire policyholders"), and claims of the Intervenor, Shearn Moody, Jr., the sum of One Hundred Thousand Dollars ($100,000.00) in compensatory damages and the further sum of One Million Dollars ($1,000,000) in exemplary damages. As grounds for said claim, Protective respectfully shows unto the Court as follows:

1. In April 1972, the State of Alabama filed a complaint in this Court against Empire, requesting that said company be placed in receivership because it was impaired and insolvent. Following a hearing thereon, Empire was placed in receivership by order entered herein on June 29, 1972, and the Commissioner of Insurance for the State of Alabama was named Re-

ceiver. The appointment of the Commissioner as Receiver for Empire operates as an implied injunction, enjoining all persons with notice of said appointment from interfering, by way of suit or otherwise, with the Receiver, the receivership proceedings, and the receivership estate in order to protect the Receiver, the integrity of the receivership proceedings, and those persons with an interest in the disposition of the assets of the receivership estate, including Protective and Protective's Empire policyholders.

2. After the appointment of the Receiver, and without obtaining the consent of this Court, in November 1974 Moody, and persons under his control, aided, assisted, sponsored, directed, and controlled the filing of a civil action in the federal district court for the Middle District of Alabama against John G. Bookout, individually, and as Commissioner of Insurance for the State of Alabama, and as Receiver of Empire, being Case No. 74-377-N, entitled *Willie Allmon etc. v. John G. Bookout, et al.* [hereinafter "*Allmon* case"].

As a result of Moody's active participation and control of the institution of the *Allmon* action, without seeking or obtaining leave of this Court, Moody is in contempt of this Court, and Protective has suffered substantial damages.

3. By Order and Injunction entered herein on January 6, 1975, this Court expressly enjoined Shearn Moody, Jr. (his officers, agents, servants, employees and attorneys) and others, from filing any lawsuit, complaint or legal claim, or any amendment to a complaint or legal claim, which lawsuit, claim or amendment relates to the receivership of Empire or the implementation of any order or decree of this Court in connection with said receivership, without the prior

approval of this Court. A true and correct copy of said Order and Injunction of January 6, 1975 [hereinafter "Injunction"] is attached hereto as Exhibit "A".

4. On or about January 28, 1975, an amended complaint in the *Allmon* case was filed by Moody's attorneys. Moody aided, assisted, directed, and controlled the filing of said Amended Complaint, and leave of this Court was neither sought nor obtained prior to the filing of said Amended Complaint.

5. Promptly after the filing of the Amended Complaint in the *Allmon* case, Protective duly instituted civil contempt proceedings against Moody and certain of Moody's agents. After hearing thereon, this Court determined that the clear and convincing, uncontested evidence established that

a) The *Allmon* lawsuit was openly and flagrantly solicited by Dale R. Major, one of Moody's agents and an attorney of record in this cause, who misrepresented himself to the named plaintiff in the *Allmon* case as an attorney for Empire rather than for Moody. At the time the *Allmon* lawsuit was filed against the Receiver and Protective, Allmon had never heard of the Receiver or Protective and knew of nothing that either had done to injure him.

b) The lawyers who appeared as attorneys of record in the *Allmon* case were attorneys in fact for Moody. The *Allmon* complaint, as amended, was filed solely by Moody lawyers, all of whom were named in this Court's Injunction, and said Amended Complaint was filed after the Supreme Court of Alabama had refused an application filed by Moody's lawyers seeking relief from the terms of said Injunction.

c) The filing of the *Allmon* complaint, as amended, was initiated, sponsored, aided, and controlled by Moody, in conjunction with his officers, agents, servants, employees and attorneys.

d) Moody knowingly and wilfully disobeyed and ignored the provisions of the Order and Injunction of this Court entered January 6, 1975.

6. Based on voluminous documentary evidence and oral testimony adduced at the hearing herein on Protective's motion seeking that Moody, among others, be held in civil contempt, this Court adjudged Moody to be in civil contempt of this Court.

7. By reason of the disobedience and refusal of Moody to comply with the provisions of said Injunction, Protective and its Empire policyholders have suffered substantial damages. Specifically, Protective has vigorously defended the *Allmon* action, the filing of which constituted a contempt of this Court, and Protective has vigorously opposed the appeal taken by Moody's lawyers to the Fifth Circuit Court of Appeals from the summary judgment entered in favor of Protective and other defendants on April 24, 1975 by the trial judge in the *Allmon* case. In connection with its defense of the *Allmon* action, Protective has been required to expend great sums of money.

8. By decree duly entered herein on April 30, 1975, Moody was ordered by this Court to undertake detailed actions in order to purge himself of his contempt of this Court.

9. Moody has failed and refused to take the actions required of him under the terms of the Order of this Court entered April 30, 1975 in order for him to purge himself of civil contempt. Specifically,

Moody has failed to comply with the following provisions, among others, set forth on page 7, *et seq.*, of the April 30, 1975 Order: (c), (e), (g), (h), and (j).

10. By reason of the disobedience and refusal of Moody to comply with the provisions of the April 30, 1975 Order and to purge himself of his contempt, Protective and its Empire policyholders have suffered substantial damages. Specifically, Protective has incurred great expense in connection with

a) seeking dismissal of the appeal taken by Moody's lawyers in the *Allmon* case;

b) pleadings and affidavits prepared and filed by Moody's attorneys and agents in opposition to Protective's motion to dismiss the *Allmon* appeal on the ground that it was moot, which such pleadings and affidavits resulted in the Fifth Circuit remanding the *Allmon* action to the federal district court;

c) proceedings on remand before the district court on the question of whether the *Allmon* action was moot, including the evidentiary hearing conducted before the district court on May 14, 1976, on the basis of which the district judge ultimately determined the *Allmon* lawsuit was moot and ordered it dismissed.

11. On or about August 19, 1976, Protective petitioned this Court to institute criminal contempt proceedings against Moody arising out of Moody's disobedience and refusal to comply with and abide by the orders and decrees of this Court. Protective is entitled to recover its costs incurred in said proceedings, together with attorneys' fees.

WHEREFORE, Protective Life Insurance Company demands judgment against the said Shearn Moody, Jr. in the amount of One Hundred Thousand Dollars ($100,000.00) to compensate it for losses resulting from Moody's contumacious disobedience of the lawful orders of this Court and Moody's persistent and active interference with the receivership proceedings and the implementation of the orders and decrees of this Court, together with all costs of this proceeding, including attorneys' fees.

FURTHER, Protective Life Insurance Company prays that exemplary damages in the sum of One Million Dollars ($1,000,000) be awarded against Moody and in favor of Protective for the benefit of Protective's Empire policyholders as described above. And Protective prays for such other and further relief as to this Court seems necessary and just.

Drayton Nabers, Jr.
/s/ William A. Robinson
William A. Robinson
Attorneys for Intervenor,
Protective Life Insurance Company

Of Counsel:
CABANISS, JOHNSTON, GARDNER, DUMAS & O'NEAL
1900 First National-Southern Natural Building
Birmingham, Alabama 35203

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Claim for Compensatory and Exemplary Damages Against Shearn Moody, Jr. has been served upon Roy Cohn, Frank Newman, and Drayton James, attorneys

of record for Shearn Moody, Jr., and upon James W. Webb and Edwin K. Livingston, attorneys of record of Charles H. Payne, by placing same in the first class United States mail, postage prepaid and properly addressed to their respective office addresses.

This 19th day of August, 1976.

/s/ William A. Robinson
Of Counsel

APPENDIX G.

Remittitur by Appellee.

In the Supreme Court of Alabama.

Shearn Moody, Jr., Appellant vs. State of Alabama, ex rel Charles H. Payne, Commissioner of Insurance and Receiver of Empire Life Insurance Company of America, Appellee. S.C. 2453.

Comes now Charles H. Payne, Commissioner of Insurance, as Receiver of Empire Life Insurance Company of America, Appellee, in the above styled cause and remits all damages in excess of Sixty Eight Thousand One Hundred Fifteen Dollars and Seventy-Eight Cents ($68,115.78) and hereby consents that the judgment in this case be reduced to Fifty Thousand Dollars ($50,000.00) punitive damages and Eighteen Thousand One Hundred Fifteen Dollars and Seventy-Eight Cents ($18,115.78) compensatory damages.

/s/ James W. Webb
JAMES W. WEBB
Attorney for Appellee

COUNSEL FOR APPELLEE:

WEBB & CRUMPTON
122 South Hill Street
Montgomery, Alabama 36104

Edwin K. Livingston
26 South Perry Street
Montgomery, Alabama 36104

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Remittitur by Appellee has been mailed to the Honorable William H. Mills, Rogers, Howard, Redden and Mills, 1033 Frank Nelson Building, Birmingham, Alabama 35203, by placing a copy of the same in the United States mail, postage prepaid, this the 7th day of February, 1978.

/s/ James W. Webb
JAMES W. WEBB
Attorney for Appellee

APPENDIX H.

Findings of Fact and Conclusions of Law.

In the Circuit Court of Jefferson County, Equity Division.

State of Alabama, ex rel. John G. Bookout, Commissioner of Insurance, Plaintiff, vs. Empire Life Insurance Company of America, an Alabama corporation, Defendant, and Shearn Moody, Jr., Intervenor. Civil Action No. 171-687. (Ancillary Proceedings For Damages; Claim of Protective Life Insurance Company Against Shearn Moody, Jr.)

Filed. Nov. 16, 1976.

This cause came before the Court for final hearing in the ancillary proceedings for damages involving the claim of intervenor Protective Life Insurance Company ("Protective") against intervenor Shearn Moody, Jr. Said ancillary proceedings were initiated on August 19, 1976 by Protective's filing of its Claim for Compensatory and Exemplary Damages Against Shearn Moody, Jr. On October 19, 1976, this Court entered default judgment against Moody and in favor of Protective based on Moody's willful and deliberate refusals to comply with the discovery ordered by this Court and to submit to his deposition noticed by Protective on August 31, 1976. However, as the damages sought by Protective were unliquidated the Court scheduled a separate hearing for purposes of determining the amount of damages Protective is entitled to recover.

The hearing on damages as between Protective and Moody commenced on November 1, 1976 and consumed almost a full week. Moody did not appear personally; he was, however, represented by two attorneys who appear as counsel of record for him

in these ancillary proceedings. After due consideration of voluminus documentary evidence adduced at said hearing, oral testimony of witnesses, deposition testimony, and argument of counsel, the Court is of the opinion that the following findings of fact and conclusions of law are due to be and are hereby entered.

Findings of Fact: Compensatory Damages

1. This Court has previously adjudicated that (a) Moody knowingly and wilfully disobeyed and ignored the Injunction entered by this Court on January 6, 1975, by sponsoring, aiding, and controlling the filing of an amended complaint in a lawsuit entitled *Willie Allmon, etc. v. John G. Bookout, et al.*, Civil Action No. 74-377-N (U.S. District Court for the Middle District of Alabama), without seeking or obtaining leave of this Court as required by said Injunction; (b) the filing and prosecution of the *Allmon* case directly and adversely affected the affairs of Empire Life Insurance Company of America ("Empire"), its receivership, its Receiver, and the implementation of the orders and decrees of this Court, including the decree of June 14, 1974; and (c) Moody, in violation of this Court's Injunction of January 6, 1975 and the Order of April 30, 1975, continued to aid, support, and control the prosecution and maintenance of the *Allmon* litigation up until June 1976, at which time said action was dismissed by the federal district court.

2. As a direct result of Moody's disobedience of orders and decrees entered by this Court, particularly the January 6, 1975 Injunction and the Order of April 30, 1975, Protective was caused to incur substantial costs and expenses in the defense of the *Allmon* case during the period from February 1, 1975 to June 1976.

3. Specifically, Protective incurred during said period costs in the amount of $36,508.00, which is the sum actually paid by Protective to its counsel for services rendered in the defense of the *Allmon* case, including taking necessary actions (a) to successfully defend against the *Allmon* complaint, as amended; (b) to support the federal district court's entry of such summary judgment on the amended complaint, from which an appeal was perfected under Moody's supervision to the Fifth Circuit Court of Appeals; (c) to seek dismissal of said appeal on the ground that the *Allmon* suit had been mooted by the voluntary surrender of the Allmon policy for its cash value during the pendency of said appeal; and (d) to prosecute the proceedings on remand before the federal district court, which resulted in dismissal of the *Allmon* case on the grounds that Willie Allmon had not been injured by the matters and things alleged in the *Allmon* complaint, as amended, and had, at any rate, voluntarily mooted the lawsuit by surrendering his policy for its cash value.

4. This Court is intimately familiar with and the evidence amply establishes (a) the enormous complexity of the procedural and substantive issues raised by Moody's attorneys in the *Allmon* suit, as amended; (b) the degree of responsibility assumed by Protective in its defense of the *Allmon* case during the period of time for which Protective seeks recovery; (c) the time expended and professional ability of the particular attorneys who rendered legal services to Protective in the *Allmon* lawsuit during the period in question; and (d) that Protective was ultimately successful in its defenses to the *Allmon* suit. Accordingly, the Court finds that the evidence establishes that Protective sustained damages in the defense of the *Allmon* lawsuit during the period for which recovery is sought, in the amount of $36,508.00. The Court further finds that the amount of such damages is fair and reasonable in all respects.

5. The Court finds that Protective also incurred incidental damages in connection with its defense of the *Allmon* case during the period of time for which Protective seeks recovery. The evidence establishes that Protective's counsel and employees incurred travel expenses to attend court hearings; deposition expenses; long distance telephone expenses; copying and other expenses and costs. However, the evidence adduced is insufficient to provide an adequate basis for computing the amount of such incidental damages.

6. No factual showing in mitigation of damages sustained by Protective was offered by counsel for Moody.

7. Protective seeks reasonable attorneys' fees for legal services rendered by its counsel in connection with the conduct and prosecution of civil contempt proceedings initiated by Protective against Moody on January 31, 1975.

Taking into account the amount of time expended by Protective's attorneys in the course of investigating and prosecuting Moody's civil contempt (but not the time devoted to preparation for and conduct of the November 2 hearing on damages and attorneys' fees) and also taking into account Moody's efforts in opposition to such proceedings; the responsibilities assumed by Protective; the learning, skill and professional ability of Protective's counsel in this complex, esoteric area of the law relative to enforcement of judicial orders

and decrees; and the expert testimony adduced, the Court has determined a reasonable attorneys' fee for the conduct and prosecution of the civil contempt proceeding to be $32,000.

8. Protective also seeks reasonable attorneys' fees arising out of legal services rendered by its counsel in connection with the conduct and prosecution of criminal contempt proceedings against Moody initiated by Protective on August 19, 1976.

Taking into account the amount of time expended by Protective's attorneys in the course of investigating and assisting in the conduct of the criminal contempt proceedings (but not the time devoted to preparation for and conduct of the November 2 hearing on damages and attorneys' fees) and also taking into account Moody's efforts in opposition to such proceedings; the learning, skill and professional ability of such counsel; the complexity of the proceedings and the expert testimony adduced, the Court determines that a reasonable attorneys' fee for the investigation and assistance provided by Protective's counsel in the criminal contempt proceedings to be $7,500.

Findings of Fact: Exemplary Damages

9. No evidence whatever was offered by counsel for Moody to show that Moody's conduct which resulted in substantial damages and injury to Protective was either unintentional or due to mistake or inadvertence or the existence of any other extenuating circumstances that would tend to show that such conduct was in any way justified.

10. The Court finds, and the evidence overwhelmingly establishes, the following aggravating circumstances:

(a) Moody's control and support of the *Allmon* case was an intentional, willful and unlawful effort by him to nullify the Decree of this Court of June 14, 1974, which determined that Empire was insolvent in excess of $6,000,000; and that reinsurance with a solvent company was necessary to protect Empire's policyholders, who number approximately 40,000; and that the reinsurance agreement submitted by Protective, in response to this Court's solicitation, was fair and reasonable in all respects and best protected Empire's policyholders.

The Decree of June 14, 1974 was entered after an extensive three-week trial, to which Moody was a party and at which Moody was represented by numerous attorneys.

(b) Moody's control and support of the *Allmon* case, as amended, was a willful, raw violation of the Injunction entered against Moody by this Court on January 6, 1975, and this Court's April 30, 1975 Order, which orders were entered for the benefit of the Receiver, Protective, and the receivership estate and all with an interest therein. Said injunction was entered against Moody after a plenary hearing at which Moody was represented by counsel.

(c) The amended complaint in the *Allmon* case was filed by Moody lawyers who were specifically enjoined from taking such action by the terms of the January 6 Injunction. The amended complaint was filed after the Supreme Court of Alabama had overruled Moody's challenges against said injunction.

(d) Moody's control and support of the *Allmon* lawsuit, as amended, was a patent attempt by Moody to put the federal district court in Montgomery on a collision course with the exercise of jurisdiction by this Court in these ongoing receivership proceedings. To serve his own sinister purposes, and without regard to the rights of any other persons, Moody, through device and deception, utilized an Arkansas policyholder of Empire, Willie Allmon, as the unwitting vehicle for his attempt to nullify the decrees of this Court. Moody's flagrant abuse of process is further exacerbated by the ultimate determination made by the federal district court in Montgomery that Willie Allmon had suffered no injury at all by reason of the Protective reinsurance agreement.

(e) When called to account by this Court for his control and support of the *Allmon* case, Moody deceptively and falsely stated: "I am not involved with the Allmon litigation." However, when it suited his purposes in a lawsuit for attorneys' fees brought against Moody by two attorneys who at one time represented him in this Court and in the *Allmon* case, Moody admitted that he himself and several of his agents had actively participated in drafting the *Allmon* pleadings.

(f) After this Court adjudged Moody to be in civil contempt and specifically ordered him, *inter alia*, to withdraw all support, aid, and assistance from the *Allmon* case, Moody surreptitiously continued to control the *Allmon* case. The cover-up was accomplished, after Moody's counsel ostensibly withdrew from the *Allmon* case, through the use of counsel for the Civil Liberties Union,

who testified on deposition that he was counsel of record for Allmon in name only and that, in substance, Scott Manley [a Moody attorney named in the January 6, 1975 Injunction and designated by Moody as his house counsel], continued as lead counsel in the *Allmon* case.

(g) Moody's outright defiance, callous disregard, and malicious attack on the decrees of this Court by way of the *Allmon* case is all the more culpable because it was accomplished through the use of his non-resident attorneys and other agents who, for all practical purposes, are immune from the actions and processes available to this Court to protect and effectuate the judgments and decrees rendered in these receivership proceedings, and to protect and secure the rights of persons for whose benefit said judgments and decrees were entered. This latter class of persons includes Protective Life Insurance Company and the thousands of Empire policyholders who elected to accept the benefits of the Protective reinsurance agreement which was approved by this Court.

11. No action yet taken by this Court has been sufficient to deter Moody from flaunting the lawful orders of this Court and attempting to nullify the Decree of June 14, 1974.

12. Taking into account the gravity of the wrong committed by Moody in his contemptuous violation of the January 6 Injunction, and also taking into account the necessity of deterring Moody and others from similar conduct in the future, this Court finds that an award of exemplary damages in the amount of $100,000.00 is just, mete and proper.

Conclusions of Law

1. Moody's control and support of the *Allmon* case in open violation of the Injunction of January 6, 1975, the validity of which has been conclusively determined by the Supreme Court of Alabama, gives rise to a remedy for damages proximately resulting from such violation in favor of Protective Life Insurance Company, one of the parties for whose benefit said injunction issued. *Lightsey v. Kensington Mortgage and Finance Corp.*, 294 Ala. 281, 315 So. 2d 431 (1975) (Merrill, J.; all justices concurring).

2. Protective is not required to pursue its remedy against Moody in another suit; rather, complete relief may be afforded in these ancillary proceedings to determine whether damages, compensatory or punitive, should, under the usual rules, be imposed. *Lightsey v. Kensington Mortgage and Finance Corp.*, 294 Ala. 281, 315 So. 2d 431 (1975) (Merrill, J.; all justices concurring).

3. Under the peculiar, aggravated facts of the case at bar, exemplary or punitive damages may, under the usual rules, be imposed against Moody. *Lightsey v. Kensington Mortgage and Finance Corp.*, 294 Ala. 281, 315 So. 2d 431 (1975) (Merrill, J.; (all justices concurring).

4. Under the uniformly accepted rule in this country, particularly in Courts of Equity, reasonable attorneys' fees relating to the prosecution of contempt proceedings may be awarded to Protective. *See* Annot., 43 A.L.R.3d 793 (1972).

5. Under the collateral source doctrine any amounts which may have been paid Protective by the Receiver in reimbursement of attorneys' fees incurred by Protective do not diminish Protective's recovery herein. *See Carlisle v. Moller*, 275 Ala. 440, 155 So. 2d 689 (1963). The Receiver, however, will not be entitled to recover such amounts from Moody upon hearing on the Receiver's claim for damages against Moody.

An appropriate Decree will be entered.

DONE, this 16th day of November, 1976.

/s/ [Illegible]
Circuit Judge in Equity Sitting

APPENDIX I.

Judgment and Decree.

In the Circuit Court of Jefferson County, Equity Division.

State of Alabama, ex rel. John G. Bookout, Commissioner of Insurance, Plaintiff, vs. Empire Life Insurance Company of America, an Alabama corporation, Defendant, and Shearn Moody, Jr., Intervenor. Civil Action No. 171-687. (Ancillary Proceedings For Damages; Claim of Protective Life Insurance Company Against Shearn Moody, Jr.)

FILED: Nov. 16, 1976.

In accordance with the Findings of Fact and Conclusions of Law entered by the Court herein on November 16th, 1976, it is hereby ORDERED, ADJUDGED, and DECREED that Intervenor Protective Life Insurance Company, a corporation, have and recover of Intervenor, Shearn Moody, Jr.:

Compensatory Damages assessed at $36,508.00; and Exemplary Damages assessed at $100,000.00.

It is FURTHER ORDERED, ADJUDGED and DECREED, as follows:

1. That Intervenor Protective Life Insurance Company have and recover from Intervenor, Shearn Moody, Jr.:

—the additional amount of $32,000.00, as reasonable attorneys' fees incurred in the prosecution of civil contempt proceedings against Shearn Moody, Jr.; and

—the additional amount of $7,500.00, as reasonable attorneys' fees incurred in the prosecution of criminal contempt proceedings against Shearn Moody, Jr.

2. That costs of this ancillary proceeding are taxed against Shearn Moody, Jr.

DONE, this 16th day of November, 1976.

/s/ [Illegible]
Circuit Judge in Equity Sitting

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-110

SHEARN MOODY, JR.,
Petitioner,

vs.

STATE OF ALABAMA, ex rel. CHARLES H. PAYNE, Commissioner of Insurance and Receiver of EMPIRE LIFE INSURANCE COMPANY OF AMERICA, and PROTECTIVE LIFE INSURANCE COMPANY, an Alabama Corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Alabama

DRAYTON NABERS, JR.
WILLIAM A. ROBINSON
CABANISS, JOHNSTON, GARDNER, DUMAS & O'NEAL
1900 First National-Southern Natural Building
Birmingham, Alabama 35203
Attorneys for Respondent, Protective Life Insurance Company

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

Cases

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-110

SHEARN MOODY, JR.,
Petitioner,

vs.

STATE OF ALABAMA, ex rel. CHARLES H. PAYNE, Commissioner of Insurance and Receiver of EMPIRE LIFE INSURANCE COMPANY OF AMERICA, and PROTECTIVE LIFE INSURANCE COMPANY, an Alabama Corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Alabama

INTRODUCTION

The Petition before this Court is the most recent in a series of attempts by Shearn Moody, Jr., to secure piecemeal review in this Court of the domiciliary receivership proceedings, involving Empire Life Insurance Company of America ("Empire"), conducted by the Alabama trial court. Petitioner ("Moody") was the chief executive officer and principal stockholder of

Empire, an insolvent Alabama insurance company. Respondents are Protective Life Insurance Company ("Protective"), the Alabama insurance company that reinsured Empire's policies during the course of the receivership proceedings, and the Commissioner of Insurance of the State of Alabama, the Empire Receiver.

The decision of the Supreme Court of Alabama which is sought to be reviewed is *Moody v. State ex rel. Payne*, 355 So. 2d 1116 (S. Ct. Ala. 1978). Citations of some of the other reported decisions in this litigation are listed below:

Moody v. State ex rel. Payne, 351 So. 2d 552 (S. Ct. Ala. 1977);

Moody v. State ex rel. Payne, 351 So. 2d 547 (S. Ct. Ala. 1977);

Ex Parte Shearn Moody, Jr., 351 So. 2d 538 (S. Ct. Ala. 1977);

Moody v. State, ex rel. Payne, 344 So. 2d 160 (1977);

Moody v. State, ex rel. Payne, 295 Ala. 299, 329 So. 2d 73 (1976);

Moody v. State, 529 S.W.2d 452 (Tex. Civ. App.—Austin 1975);

Empire Life Ins. Co. v. State, 492 S.W.2d 366 (Tex. Civ. App.—Austin 1973);

Moody v. Crook, 520 S.W.2d 958 (Tex. Civ. App.—Austin 1975);

Moody v. Jones, 519 S.W.2d 536 (Tex. Civ. App.—Austin 1975);

Day v. State, 489 S.W.2d 368 (Tex. Civ. App.—Austin 1972, n.r.e.*);

Moody v. Moody Nat'l Bank, 522 S.W.2d 710 (Tex. Civ. App.—Houston 1975, n.r.e.);

Moody v. Texas, 538 S.W.2d 158 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e. 1977).

---

* Indicates denial of review by the Texas Supreme Court upon a finding of "no reversible error" (n.r.e.).

This Court has, to date, denied five of Moody's petitions for certiorari relating to the Empire receivership proceedings.[1] The Petition now before this Court seeks review of certain money judgments entered against Moody by the Alabama receivership court in the wake of a civil-contempt adjudication that was entered by the Alabama receivership court on April 30, 1975. No ordinary appellate review in the Supreme Court of Alabama was sought by Moody from the civil-contempt adjudication, and this Court denied Moody's petition for writ of certiorari challenging the contempt adjudication in Case No. 76-1845.[2] The civil-contempt adjudication was based upon Moody's violation of an injunction entered by the Alabama receivership court on January 6, 1975. Moody appealed the injunction to the Supreme Court of Alabama *Moody v. State Ex Rel. Payne*, 295 Ala. 299, 329 So. 2d 73 (1976). That Court affirmed, holding that "[t]he injunction [against Moody] was not only justified but was necessary to preserve the assets of Empire." 295 Ala. at 306, 329 So. 2d at 79. Moody sought no timely review in this Court of the decision of the Alabama Supreme Court affirming the January 6, 1975 injunction. Moody did, however, unsuccessfully attempt a collateral attack upon the injunction by petition for certiorari filed in this Court in Case No. 77-1041.[3]

---

[1] Petitions have been denied in *Ex parte Shearn Moody, Jr.*, No. 76-1845, *cert. denied* 10/3/77, *reh. denied* 11/28/77; *Shearn Moody, Jr. v. Texas*, No. 77-571, *cert. denied* 12/5/77, *reh. denied* 1/16/78; *Shearn Moody, Jr. v. State of Alabama, ex rel. Payne*, No. 77-428, *cert. denied* 12/12/77; *Shearn Moody, Jr. et al. v. Texas*, No. 77-873, *cert. denied* 2/21/78; *Shearn Moody, Jr. v. State of Alabama ex rel. Payne*, No. 77-1109, *cert. denied* 4/17/78; *Ex Parte Shearn Moody, Jr.*, No. 77-1041, *cert. denied* 4/17/78.

[2] *Ex parte Shearn Moody, Jr.*, No. 76-1845, *cert. denied* October 3, 1977, *reh. denied* November 28, 1977.

[3] *Ex Parte Shearn Moody, Jr.*, No. 77-1041, *cert. denied* April 17, 1978.

STATEMENT OF THE CASE

The injunction which the Petition attacks was entered by the Alabama receivership court on January 6, 1975. The injunction prohibited Moody from filing any lawsuit or amended complaints against the Empire Receiver or Protective, without first obtaining the receivership court's approval. Simply stated, the injunction prohibited Moody from interfering with the receivership estate and the receivership proceedings. (The injunction is appended to Pet. before this Court as Exh. D). After the injunction had been entered against him, Moody petitioned the Alabama Supreme Court to issue extraordinary writs of mandamus and prohibitions declaring the receivership court's injunction invalid. The Alabama Supreme Court denied extraordinary relief (S. Ct. Ala. No. 1125). Moody applied for, and was refused, rehearing (*id.*). Moody then perfected an appeal from the injunction (Ala. S. Ct. 1969), and the Alabama Supreme Court affirmed. *Moody v. State Ex Rel. Payne,* 295 Ala. 299, 329 So. 2d 73 (1976). No timely review of the affirmance of the injunction by the Alabama Supreme Court was sought in this Court.

During the pendency of Moody's appeal to the Alabama Supreme Court challenging the validity of the receivership court's injunction against him, an amended complaint was filed by Moody's lawyers in the case of *Allmon v. Bookout.*[4] The *Allmon* amended complaint sought to nullify every single order of the receivership court from the time that receivership proceedings were instituted against Empire in 1972 (R. 165-66). Immediately after the amended complaint was filed, Protective

[4] *Allmon v. Bookout, et al.,* No. 74-377-N (M.D. Ala. 1974); No. 75-2104 (5th Cir.) Though Moody solicited an Empire policyholder to file the *Allmon* lawsuit, Moody was neither an Empire policyholder himself, nor was Moody an actual party to the *Allmon* suit. *Moody v. State,* 295 Ala. at 303, 308 (1976); *See also* R. 92-110.

petitioned the receivership court for a show-cause order and civil-contempt adjudication against Moody. After an evidentiary hearing, Moody was adjudicated in civil-contempt by order entered April 30, 1975. The contempt adjudication specified what actions were required of Moody to purge himself of contempt. In the meanwhile, determination of the amount of damages sustained by Protective and the Empire Receiver as a result of Moody's contempt was postponed.

On August 19, 1976, after the *Allmon* action had been dismissed as moot on the grounds that Allmon had voluntarily surrendered his Empire policy and, at any rate, had not in any way been injured by the receivership proceedings, Protective filed a claim in the receivership proceeding for compensatory and exemplary damages against Moody.[5] Thereafter, a trial was conducted to determine the amount of Protective's damages resulting from Moody's contempt, *i.e.,* Moody's sponsorship of the *Allmon* action in open violation of the January 6, 1975 injunction of the receivership court. At the conclusion of the damage hearing, the receivership court entered extensive findings of fact and conclusions of law (R. 76-84, appended to Pet. before this Court as Exh. I). On Moody's appeal from the damage judgment, the Supreme Court of Alabama reduced the amount of the judgment in favor of Protective to $165,228.50. The judgment, as corrected, was affirmed and rendered. The instant petition for a writ of certiorari in this Court ensued.

The sole issue presented by the Petition now before this Court is whether the money judgments sought to be reviewed are invalid under the case of *Donovan v. City of Dallas,* 377 U.S. 408 (1964).

[5] It is authorized under Alabama law to have damages resulting from civil contempt determined in an ancillary proceeding conducted in the case out of which the contempt arose. *Lightsey v. Kensington Mortgage and Finance Corp.,* 294 Ala. 281, 315 So. 2d 431 (1975), this procedure was reaffirmed by the decision of the Supreme Court of Alabama which is sought to be reviewed by the instant Petition. *Moody v. State ex rel. Payne,* 355 So. 2d 1116 (S. Ct. Ala. 1978).

ARGUMENT

The undisputed facts can be succinctly summarized. Moody was enjoined in January 1975 by the receivership court from participating in the filing of an amended complaint in the *Allmon* lawsuit, without first securing the approval of the receivership court. Shortly thereafter, Moody participated in the filing of such an amendment, which sought, *inter alia*, to nullify every order entered by the receivership court in the Empire receivership proceedings. Moody never sought the approval of the receivership court prior to filing the amended complaint. In April 1975, Moody was held in civil-contempt for having violated the injunction, and, after a damage hearing conducted by the Alabama receivership court in accordance with established procedure, money judgments were entered against him. The money judgments, after slight reduction in amount, were affirmed and rendered by the Supreme Court of Alabama, and the instant Petition was thereafter filed in this Court.

Moody contends that the petition for a writ of certiorari should be granted because the damage judgments sought to be reviewed are based upon a civil-contempt judgment that, in turn, is based upon a violation of an injunction that is invalid under the supremacy clause of the Constitution and the decision of this Court in *Donovan v. City of Dallas*, 377 U.S. 408 (1964).

For five compelling, independently sufficient reasons, the Petition should be denied. First, the Petition does not, and Moody cannot, show that he was deprived of any federal right, privilege or immunity. The Petition baldly asserts that "[a]s in the *Donovan* case, the petitioner herein was cited and adjudicated in civil-contempt . . . for attempting to exercise his federally guaranteed rights by participating in the *Allmon in personam* federal court actions . . ." (Pet. at 13). This is a false and sham issue, for Moody was neither a party litigant in the *Allmon* action, nor a member of the class of persons—Empire policy-

holders—ostensibly represented in the *Allmon* case.[6] It is well settled that one party will not be allowed to assert in this Court the constitutional rights of another. *See Laird v. Tatum*, 408 U.S. 1, 15, 92 S. Ct. 1318, 33 L. Ed. 2d 165 (1962); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1965). Accordingly, Moody's attempt in this case to assert purported federally secured rights of the litigants in the *Allmon* case or alleged rights of Empire policyholders is to be rejected. As no other deprivation is claimed by Moody, the conclusion is inescapable that there is no jurisdictional basis for review by this Court, and the Petition should therefore be denied.

Second, the only issue presented by Moody's current petition was conclusively decided against him by the Supreme Court of Alabama, years ago, and Moody sought no timely review of that adverse decision in this Court. It appears on the face of the receivership-court injunction that Moody was restrained from participating in the filing of the *Allmon* amended complaint "unless . . . Shearn Moody, Jr., . . . shall first receive the prior approval of this Court." (The injunction is appended to the Pet. before this Court as Exh. D). Moody never sought the approval of the receivership court prior to the filing of the *Allmon* amended complaint, and he never sought to have the injunction dissolved or modified. Rather, Moody appealed the injunction to the Supreme Court of Alabama in 1975. There, he made exactly the argument he now urges this Court to adopt, namely that the receivership court's injunction violates the rule of *Donovan v. City of Dallas, supra*. In its decision reported in February 1976, the Supreme Court of Alabama rejected Moody's argument:

> "Most of [Moody's] brief and most of his oral argument were devoted to the proposition stated in *Donovan v. City of Dallas*, 377 U.S. 408, 84 S. Ct. 1579, 12 L. Ed. 2d

---

[6] *See* note 4, *supra*.

409 (1964), that 'state courts are completely without power to restrain federal-court proceedings in *in personam* actions.' This principle is not new to us. *Donovan* was cited and applied by this court in *Johnson v. Brown-Service Ins. Co.*, 293 Ala. 549, 307 So. 2d 518 (1974). . . .

"Moody made this argument in trying to show that the filing of the case of *Allmon v. Bookout* was not in violation of the injunction issued by [the receivership court].

"It is interesting to note that the same paragraph in which the previous quote [from *Donovan*] appears begins with some careful writing and limitation by Justice Black, the author of the opinion:

> 'Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem*. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida v. Thompson*, 305 U.S. 456, 465-468, 59 S. Ct. 275, 280, 281, 83 L. Ed. 285. In *Princess Lida* this Court said "where the judgment sought is strictly *in personam*, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other." [citations omitted].

"We have already shown that these suits [sponsored by Moody] were repeated attempts to remove assets from the *res* of the receivership and liquidation proceedings. The

> federal courts have consistently followed the rule that proceedings involving the liquidation of the business and assets of an insurance corporation are *in rem* or *quasi in rem* proceedings. *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 194-95, 55 S. Ct. 386, 388, 79 L. Ed. 850, 854-55; *Jacobs v. DeShetter*, 465 F. 2d 840 (6th Cir.); *Gillis v. Keystone Mut. Casualty Co.*, 172 F. 2d 826, 829 (6th Cir.), *cert. denied*, 338 U.S. 822, 70 S. Ct. 67, 94 L. Ed. 499; *Holley v. General American Life Ins. Co.*, 101 F. 2d 172 (8th Cir.), *cert. denied*, 307 U.S. 615, 59 S. Ct. 1038, 83 L. Ed. 1496; *Liberty National Ins. Co. v. Reinsurance Agency, Inc.*, 307 F. 2d 164, 168 (9th Cir.); *Hutchins v. Pacific Mut. Life Ins. Co.*, 20 F. Supp. 150, 152 (S.D. Cal.), *Aff'd*, 97 F. 2d 58, 60 (9th Cir.).
>
> . . . We are convinced that [the receivership court] did not violate either the letter or the spirit of *Donovan*."

Moody v. State ex rel. Payne, 295 Ala. 299, 307-08 (1976). Moody sought no timely review by this Court of the 1976 decision of the Alabama Supreme Court rejecting his claim that the receivership injunction violated the *Donovan* principle. Yet the Petition now before this Court does not even acknowledge that the only issue presented by it was decided against Moody over two years ago. For the independent reason that the purported federal question presented by the instant Petition could only have been, but was not, presented by Moody after the 1976 decision of the Alabama Supreme Court, the instant Petition is due to be denied.

Third, as the reported decision of the Alabama Supreme Court in 1976 amply demonstrates, Moody's claim that the receivership court's injunction is contrary to *Donovan*, is totally without merit. *See Moody v. State ex rel. Payne*, 295 Ala. 299, 329 So. 2d 73 (1976). For this independent reason, the Peti-

tion is due to be denied because the Supreme Court of Alabama correctly decided the issue on the merits in 1976.

Fourth, petitioner has not demonstrated and, in fact, cannot demonstrate that the federal question he seeks to have reviewed by this Court was timely preserved in his appeal from the money judgments affirmed by the Supreme Court of Alabama. This Court has made it particularly clear that no jurisdiction to exercise review by certiorari exists unless the record affirmatively shows that the federal question was presented to the highest state court having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *See, e.g., Durley v. Mayo,* 351 U.S. 277 (1956); *Williams v. Kizer,* 323 U.S. 471 (1945); *Honeyman v. Hanan,* 300 U.S. 14 (1937); *Lynch v. New York ex rel. Pierson,* 293 U.S. 52 (1934). No suggestion was made in Moody's appeal to the Alabama Supreme Court from the money judgments sought to be reviewed by the instant Petition that the judgments were invalid under *Donovan.* Because of Moody's conspicuous failure to satisfy the fundamental jurisdictional requirement that the federal question sought to be reviewed was preserved in the highest State court below, the Petition is due to be summarily denied.

Fifth, even if it be assumed, *arguendo,* that the receivership court's injunction was invalid under *Donovan* and that the Alabama Supreme Court erroneously decided this issue in 1976, Moody cannot thereby escape his liability for contempt after disobeying the injunction. *Cf. Walker v. City of Birmingham,* 388 U.S. 307 (1967). Accordingly, the money judgments that establish the amount of Moody's liability present no occasion for granting the instant Petition.

CONCLUSION

Based on the foregoing authorities and analysis, the petition for writ of certiorari is due to be denied. It appears to a certainty that there is no ground for granting such a writ.

Respectfully submitted,

DRAYTON NABERS, JR.

WILLIAM A. ROBINSON
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1900 First National-Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8800
Attorneys for Respondent, Protective
Life Insurance Company

Proof of Service

Proof of service of three copies of Respondent's Brief in Opposition to Petition for a Writ of Certiorari upon all parties separately represented by counsel was filed by William A. Robinson, a member of the bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the brief in opposition was filed.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-110

SHEARN MOODY, JR.,
Petitioner,

VS.

STATE OF ALABAMA, EX REL. CHARLES H. PAYNE,
Commissioner of Insurance and Receiver of Empire
Life Insurance Co., of America
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

JAMES W. WEBB
WEBB & CRUMPTON
122 South Hull Street
P. O. Box 238
Montgomery, Alabama 36101

EDWIN K. LIVINGSTON
26 South Perry Street
Montgomery, Alabama 36104

Attorneys for Respondent, Charles H. Payne

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

CASES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-110

SHEARN MOODY, JR.,
Petitioner,

VS.

STATE OF ALABAMA, EX REL. CHARLES H. PAYNE, Commissioner of Insurance and Receiver of Empire Life Insurance Co., of America
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

RELATED LITIGATION

The opinion of the Supreme Court of Alabama is reported at Ala, 355 So. 2d 1116.

Related Court decisions are:

Moody v. State. ex rel Payne, 295 Ala. 299, 329 So. 2d 73 (1976);

Moody v. State, ex rel Payne, Ala., 351 So. 2d 547 (1977);

Moody v. State, ex rel Payne, Ala.,351 So. 2d 552 (1977);

Moody v. State, ex rel Payne, 520 S.W. 2d 452 (Tex Civ. App. - Austin 1975);

Empire Life Ins. Co. v. State, 492 S.W. 2d 366 (Tex. Civ. App. - Austin 1973);

Moody v. Crook, 420 S.W. 2d 958 (Tex. Civ. App. Austin 1975);

Moody v. Jones, 518 S.W. 2d 536 (Tex. Civ. App. Austin 1975);

Day v. Jones, 489 S.W. 2d 368 (Tex. Civ. App. - Austin 1972, n.r.e.);*

Moody v. Moody Nat'l Bank. 522 S.W. 2d 710 (Tex. Civ. App. - Galveston 1975, n.r.e.);

Moody v. Texas, 538 S.W. 2d 158 (Tex. Civ. App. - Waco 1976 writ ref'd n.r.e. 1977).

---

*Indicates denial of review by the Texas Supreme Court upon finding of "no reversible error" (n.r.e.).

Other petitions of related cases reaching this Court are:

No. 77-428 (denied December 12, 1977, rehearing denied February 21, 1978)

No. 76-1845 (denied October 3, 1977, rehearing denied November 28, 1977)

No. 77-873 (denied)

No. 77-571 (denied December 12, 1977, rehearing denied January 16, 1978)

No. 77-1041 (denied April 17, 1978)

No. 77-1109 (denied April 17, 1978)

QUESTION PRESENTED

May Petitioner raise an issue for the first time on Petition for Writ of Certiorari in the United States Supreme Court?

STATEMENT OF THE CASE

1. Background of Receivership.

On June 29, 1972, Empire Life Insurance Company of America (Empire) was found to be impaired and insolvent and placed in Receivership by the Circuit Court of Jefferson County, Alabama. Empire was also placed in ancillary receivership in the States of Arkansas, Montana and Texas. The president, chairman of the board of directors and principal stockholder of Empire was Shearn Moody, Jr., (Moody).

Following an extensive hearing in which Moody was represented as a party litigant, the receivership court determined Empire to be impaired in excess of ten million dollars, insolvent in excess of six million dollars and ordered the Company liquidated and the active insurance business reinsured into Protective Life Insurance Company. This case was upheld in *Moody v. State, ex rel Payne,* Ala., 344 So. 2d 160, (1977) cert denied *Shearn Moody, Jr., v. Charles H. Payne, etc.,* U.S., (Case No. 77-428).

2. Background of Injunction.

The facts leading up to the January 6, 1975 order of the trial court enjoining Moody are best stated by the Supreme Court of Alabama speaking through Mr. Justice Merrill in *Moody v. State, ex rel Payne,* 295 Ala. 299 (pp 302-304), 329 So. 2d 73 (1976). A shorthand rendition of those facts are as follows:

On December 27, 1974, the Receiver of Empire, Commissioner of Insurance, John G. Bookout, applied for and received a temporary restraining order against Moody and others. To supplement the application, Bookout attached affidavits concerning the multiplicity of litigation instituted by Moody following the court devaluation of Empire's principal asset and the order of liquidation and reinsurance. A hearing on that application was set for January 6, 1975.

At the hearing on January 6, 1975, Commissioner Bookout testified that he had been subjected, both as Receiver of Empire and individually, to numerous law suits and proceedings filed by Moody or Moody Attorneys all of which related to the Empire receivership and were filed subsequent to the plenary hearing conducted by the receivership court in April of 1974 culminating in an order of insolvency and reinsurance on June 14, 1974. Bookout also testified in detail as to some seven separate actions then pending or filed by Moody or instituted by Moody.

Commissioner Bookout further testified as to a threat made by Shearn Moody in the following terms:

> "(Shearn Moody) said to me, in words to this effect, Mr. Bookout, we are just getting started on you.
>
> I intend to sue you personally. My actions will be of a personal nature against you to carry over after you have left the office (of Commissioner of Insurance). ***we killed Crawford Martin and somebody else, ***he died with a heart attack the day after he signed his deposition, and we are beginning on you, and we are going to keep on if it takes us fifty years." (295 Ala. 304)

Following the hearing, the Court issued an order restraining Moody and others from filing any lawsuit,

complaint, legal claim or amendment thereto which related to the receivership of Empire Life Insurance Company of America without prior approval of the receivership court. This injunction was upheld by the Supreme Court of Alabama in *Moody v. State, ex rel payne,* supra. Sell also, *Ex parte Moody,* Ala., 351 So. 2d 538 (1977). Note also Title 28A, Section 624 (2) Code of Alabama Recompiled 1958 (Section 27-32-5, Code of Alabama 1975).

3. **Present Litigation.**

This proceeding arises out of a petition by Charles H. Payne as Receiver of Empire against Moody for damages suffered by the receivership estate as a result of the willfull disobedience of the injunction issued January 6, 1975. As a part of that injunction, Mr. Moody was restrained by the trial court from filing any amended complaint in that action initiated by him in the United State District Court for the Middle District of Alabama entitled *Allmon v. Bookout,* Civil Action Number 74-377-N.

Following the injunction of January 6, 1975, Moody took an extraordinary appeal to the State Supreme Court. The extraordinary proceedings were denied on January 27, 1975. On the very next day, January 28, 1975, Moody, in open defiance of the courts, filed an amended complaint in the *Allmon* case. Thereafter, on petition of the aggrieved parties, Moody was ordered to show cause why he should not be held in contempt. A hearing was held before the trial court resulting in an order finding Moody in contempt of court. This order on review of the Supreme Court of Alabama resulted in a direction to the trial court to specify in detail what actions were required of Moody to purge himself of contempt. As a result of that order, the trial court entered an order April 30, 1975, detailing the findings of contempt and detailing the actions required by Moody to purge himself of this contempt.

A hearing was set for May 19, 1975, which thereafter was continued from time to time due to the continuation of the *Allmon* proceeding in the United States District Court and in the Fifth Circuit Court of Appeals. No appeal was taken by Moody from the order of April 30, 1975. An appeal, however, was taken from the order of January 6th, resulting in the Supreme Court decision reported in *Moody v. State, ex rel Payne,* 295 Ala. 299, 329 So. 2d 73.

On June 5, 1975, the Receiver of Empire filed a motion for damages to be assessed against Moody in favor of the receivership estate resulting from Moody's willful violation of the order of the trial court of January 6th. This motion was also continued by the court from time to time.

On final determination of the *Allmon* action by the United States District Court in May, 1976, the trial court on June 16, 1976, ordered Moody to appear July 19, 1976, to demonstrate that he had purged himself of civil contempt and fully complied with the April 30th order. A hearing was held on July 19, 1976 at which time Moody was represented by counsel. This hearing proceeded on the issues of whether Moody had purged himself and resulted in a determination by the Court rendered November 1, 1976 finding that Moody had failed to comply with the order and was still in civil contempt. A separate appeal was taken from that order by Moody.

Following the hearing of July 19, 1976, the Receiver of Empire of July 20, 1976, filed the amended petition for damages to be assessed against Moody as a result of his continuing, willful violation of the order of January 6, 1975. Moody's response was filed, together with a request for jury trial. A jury was impaneled and trial began on November 29, 1976. The jury returned a verdict assessing punitive damages in the amount of Fifty Thousand Dollars ($50,000.00) and compensatory damages in the

equal amount of Fifty Thousand Dollars ($50,000.00). After remittitur, the compensatory damages were reduced to Eighteen Thousand One Hundred Fifteen Dollars and Seventy Eight Cents ($18,115.78).

Protective Life Insurance Company also filed a petition for damages which was tried before the trial court without a jury. These two cases were consolidated on appeal in view of the controlling question raised in both cases by Moody concerning whether a party who sustains damages as a result of another's contemptuous acts may recover for his damages without instituting a separate action.

ARGUMENT

I. THE UNITED STATES SUPREME COURT WILL NOT UNDERTAKE TO REVIEW WHAT THE COURT BELOW DID NOT DECIDE.

Moody directs his entire petition to the principle that the Alabama state court injunction of January 6, 1975, and the civil contempt judgments based thereon are in direct conflict with the legal and constitutional principles enunciated by this court in *Donovan v. City of Dallas,* 377 U.S. 408 (1964) and *General Atomic v. Felter,* U.S. , 98 S. Ct. 76 (1977).

On page nineteen of Moody's brief, there appears the following statement:

> "Although the *Donovan* principle was again raised by petitioner in the civil contempt judgment cases, which are the subject of the case at bench, the Alabama Supreme Court ignored the *Donovan* issue in its written Opinion and, instead, addressed itself solely to other unrelated issues."

The Rules of Appellate Procedure for Alabama are similar to those of the United States Fifth Circuit Court of Appeals as well as the rules of this Court and require under Rule 28, a table of contents, a statement of the case, a statement of the issues presented for review, a full statement of facts and an argument. All issues presented by the Appellant appear in the statement of issues.

In the instant case on appeal to the Supreme Court of Alabama, Moody filed two briefs, one on the 24th day of June stating all of his issues and citations of authority and the second on August 18, 1977, in the nature of a reply

brief to the brief of the Appellees. A copy of the briefs is available for the Court on request. Moody neither raised the *Donovan* principle as an issue nor did Moody even cite the *Donovan* case as an authority.

The *Donovan* principle not only was not raised in the Supreme Court of Alabama, it further was not raised in the trial court on the trial of these issues.

This Court has previously held in *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, (1954):

> "Of course, we will not undertake to review what the court below did not decide. The state court has not passed on any question of discrimination arising from the regulations or any question as to the interpretation or validity thereof."

See also *City of Eastlake v. Forest City Enterprises, Inc.,* *U.S.* , 96 S. Ct. 2358 (1976).

II. DOCTRINE OF CONCURRENT JURISDICTION-THE EXCEPTION

Even if Moody could raise the *Donovan* issue at this point, the issue is not applicable to this case.

The *Allmon* case, for which Moody was found in contempt, resulting in the damages assessed in this case, was first filed on November 22, 1974. As a result of this and numerous other actions brought by Moody, who was also a party to the receivership proceedings, the trial court on petition of the receiver issued its injunction of January 6, 1975. Following the Supreme Court's denial of review on January 27, 1975, Moody, in open defiance, filed his amended complaint in the *Allmon* action directly attacking every part of the receivership proceeding.

Though, entitled a civil rights action (no issue of antitrust was raised, contrary to assertions of the petitioner), the case attempted merely to use the vehicle of civil rights to relitigate the entire receivership proceedings and wrest the control of the res from the receiver and the receivership court. The United States District Court for the Middle District of Alabama looked beyond the claim of civil rights to the purpose of the litigation and declined to interfere with the receivership court's control of the estate.

The leading case on the subject of concurrent jurisdiction of the state and federal judiciary is that of *Princess Lida of Thurn and Taxis v. Thompson,* 305 U.S. 452 (1938). This Court, after reviewing the problems of concurrent jurisdictions of the Supreme Court of Pennsylvania and the United States District Court, held:

> "...it is settled that where the judgment sought is strictly in personam both the state court and the federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, *if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the one court must yield to that of the other.* We have said the "the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where courts are brought to marshall assets, administer trusts, or liquidate estates, and in suits of similar nature where, to give effect to its jurisdiction, the

court must control the property." (305 U.S. 280) (emphasis supplied)

A similar case is that of *Hutchins v. Pacific Mutual Life Insurance Company,* 20 F. Supp. 150 (S.D. Cal. 1937) affirmed 97 F. 2d 58 (9th Cir. 1938). In that case, prior to any suit being filed in federal court, the state court vested title of all of the assets of an insolvent domestic insurance company in the Insurance Commissioner of California pursuant to his petition. Subsequently, pursuant to petition of the Insurance Commissioner, the court approved liquidation of the insolvent company on the grounds that conservation was futile. The Commissioner filed a plan of reorganization whereby a new insurance company was to acquire the assets of the insolvent company. The plan, after approval by the state, was fully executed.

Thereafter, suit was brought in federal court seeking reconveyance of the assets on the grounds that the entire state proceeding was fraudulent and therefore the state court lacked jurisdiction. The district court in dismissing the federal action stated:

> "This action, and the one in the state courts are actions in rem, or at least, quasi in rem. *The relief sought is primarily concerned with the assets in question.* The rule in such cases is that *the court first acquiring jurisdiction of the res has exclusive jurisdiction."* (20 F. Supp. 152) (emphasis supplied)

Donovan v. City of Dallas, 377 U.S. 408 (1964) does not change the rules set forth in *Princess Lida* and *Hutchins,* supra but recognizes the exception where a court has custody of property, that is proceedings in rem or quasi in rem.

General Atomic v. Felter, 434 U.S. , 98 S. Ct. 76 (1977) did not deal with an in rem or quasi in rem situation.

Rather, in that case, this Court reversed the New Mexico Supreme Court in its conclusion that *Donovan,* supra, precluded state courts only from enjoining litigants from proceeding further with federal suits in which jurisdiction has already attached at the time of the issuance of the injunction.

The mere assertion by Moody that his "civil rights" action in *Allmon v. Bookout* was an in personam action does not make it such. The United States District Court for the Middle District of Alabama did not agree with Moody. The Alabama Supreme Court did not agree with Moody and there is no reason for any other person to agree with Moody on this issue. The entire thrust of *Allmon* was to wrest control of the receivership estate from the state court and retry all of the issues previously litigated using the civil rights statute as a vehicle for federal jurisdiction.

Other cases cited by the Petitioner are so far afield from the subject matter of this case as to not merit discussion.

CONCLUSION

Once again Moody seeks to review the injunction issued by the Circuit Court of Jefferson County, Alabama on January 6th, 1975. That injunction has previously been reviewed on numerous occasions, both by the Supreme Court of Alabama and by this Court. The most recent review being *Shearn Moody, Jr., v. State of Alabama, ex rel Charles H. Payne, etc.*, (77-1109, cert. denied April 17th, 1978).

The facts of this case, however, do not merit another review of that injunction. On the trial of the case at bar, i.e. the issue of damages, Moody never once raised the issue of whether the *Allmon* action was in personam as opposed to in rem. He never once in this proceeding raised the issue of whether the injunction should be held applicable to the *Allmon* case on federal constitutional grounds as expressed in the *Donovan* case, supra. Having failed to raise the issue in the state court, Respondent insists that Moody cannot now for the first time raise the issue on petition for certiorari.

Even if Moody perchance could raise that issue in this Court, the mere statement by Moody that the *Allmon* case was an in personam action because it was proportedly brought under the civil rights statute does not necessarily make it true. The United States District Court, citing *Princess Lida* and *Hutchins*, supra, as authority, denied Moody's contention. There is no reason for this Court now at this late date, in this proceeding, to review that decision. For these reasons, the petition should be denied.

RESPECTFULLY SUBMITTED:

JAMES W. WEBB
Attorney for Respondent

OF COUNSEL:

WEBB & CRUMPTON
Attorneys at Law
122 South Hull Street
P.O. Box 238
Montgomery, Alabama 36101

EDWIN K. LIVINGSTON
Attorney at Law
30 South Perry Street
Montgomery, Alabma 36104

PROOF OF SERVICE

Proof of Service of three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari upon all parties separately represented by Counsel was filed by James W. Webb, a member of the bar of the United States Supreme Court, with the Clerk of the United States Supreme Court of the same date the Brief in Opposition was filed.

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-110

SHEARN MOODY, JR.,

Petitioner,

vs.

STATE OF ALABAMA, ex rel. CHARLES H. PAYNE, Commissioner of Insurance and Receiver of EMPIRE LIFE INSURANCE COMPANY OF AMERICA, and PROTECTIVE LIFE INSURANCE COMPANY, an Alabama Corporation,

Respondents.

Petitioner's Reply to Respondents' Brief in Opposition.

FREDERICK J. LAWSON,
Law Offices of FREDERICK J. LAWSON,
15233 Ventura Boulevard, Suite 414,
Sherman Oaks, Calif. 91403,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases — Page

Statutes

Textbook

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-110

SHEARN MOODY, JR.,

Petitioner,

vs.

STATE OF ALABAMA, ex rel. CHARLES H. PAYNE, Commissioner of Insurance and Receiver of EMPIRE LIFE INSURANCE COMPANY OF AMERICA, and PROTECTIVE LIFE INSURANCE COMPANY, an Alabama Corporation,

Respondents.

Petitioner's Reply to Respondents' Brief in Opposition.

To the Supreme Court of the United States:

Petitioner, SHEARN MOODY, JR., submits this Reply Brief in response to the separate briefs in opposition to his Petition for Writ of Certiorari by respondent CHARLES H. PAYNE and respondent PROTECTIVE LIFE INSURANCE COMPANY.

Preliminary Statement.

It is undisputed by Respondents that the subject civil contempt judgments against Petitioner in the sum of $233,344.30 are based solely upon Petitioner's participation in a federal Civil Rights action (*Allmon*

case). Respondents have cited in their Briefs numerous companion cases which involved additional fines and jail sentences imposed by the Alabama state court against Petitioner because of his involvement in the *Allmon* Civil Rights case. The only significance of the companion cases cited by Respondents is to demonstrate to this Court the numerous efforts made by Petitioner to exhaust his state court remedies in obtaining a determination that the subject injunction of January 6, 1975 was improper, invalid and beyond the jurisdiction and authority of the Alabama trial court to issue. Having failed in his attempt to void the unlawful state court injunction and to expose the corruption and unlawful practices attendant with the state court receivership proceeding, the Petitioner sought sanctuary in a federal court of the United States. For this he was ordered jailed and penalized by judgments in the case at bench in the amount of nearly a quarter of a million dollars.

Respondents argue that Petitioner failed to raise the *Donovan* principle (*Donovan v. City of Dallas,* 377 U.S. 408) in a timely fashion; and in the alternative, that *Donovan* is not applicable to Petitioner because the *Allmon* case was an action in rem. Such argument is clearly erroneous and is without merit as demonstrated below.

I.

Petitioner Raised the Donovan Issue in the Alabama Trial and Appellate Courts in a Timely Fashion.

Respondent PROTECTIVE LIFE INSURANCE COMPANY OF AMERICA (hereinafter PROTECTIVE) concedes in its Brief that Petitioner initially

attacked the subject injunction in the lower courts by extensively arguing the application of the *Donovan* principle and the federal constitutional principles stated therein (PROTECTIVE Brief in Opposition, at pp. 7-9). Indeed, as cited by PROTECTIVE, the Alabama Supreme Court declared in *Moody v. Alabama ex rel. Payne,* 329 So.2d 73 at page 79:

> "Most of Moody's brief and most of his oral argument were devoted to the proposition stated in *Donovan v. City of Dallas,* 377 U.S. 408, 84 S. Ct. 1579, 12 L. Ed. 2d 409 (1964), that 'state courts are completely without power to restrain federal-court proceedings in in personam actions.'" (Protective Brief in Opposition, at pp. 7-8).

After failing in his direct attack against the injunction, Petitioner requested permission of the state court to file a federal in personam action. Permission was denied by the court and Petitioner appealed and sought Mandate by the Alabama Supreme Court. Again, Petitioner argued *Donovan* and the constitutional principles stated therein, but, again, the Alabama Supreme Court rejected his *Donovan* challenge (see *Moody v. Alabama ex rel. Payne,* 351 So.2d 552). The court defined the issues in Petitioner's Mandate action as follows:

> "Moody says the issue presented for review is whether an Alabama court may enjoin a party from instituting an action in a federal court asserting a claim under a federal statute. We would state it as whether: under the circumstances of this case; under the Constitutions of the United States and Alabama; and the federal and Alabama law, the trial court had the authority to prohibit

> Moody from filing a complaint in federal court? . . .
>
> Moody says that under the state and federal constitutions he has an unfettered right to file a suit in federal court because his claim was based upon violation of the federal anti-trust laws. He says his right cannot be abrogated by a state court and cites *Donovan v. Dallas* (cite) in support." (*Ibid.* 351 So.2d 552, at 553-554).

The court further confirmed that it had previously considered Petitioner's *Donovan* argument and declared:

> "Donovan was the subject of much discussion in *Moody v. State ex rel. Payne*, supra . . .
>
> We unequivocally held in *Moody* that the Empire receivership was an *in rem* or *quasi in rem* proceeding and the injunction of 6 January 1975 was a proper exercise of the circuit court's power. We adhere to that holding." (*Ibid.*).

Furthermore, Petitioner challenged the trial court's jurisdiction and authority to enter the subject injunction in his initial answers to each of Respondents' complaints (Answers to Petitions, Second Defense). However, Petitioner was precluded from specifically arguing *Donovan* (and the constitutional challenges stated therein) at the trial court level because of a default judgment entered in the PROTECTIVE case shortly after Petitioner filed his Answer.

Petitioner appealed the subject civil contempt judgments, which were consolidated by the Alabama Supreme Court. Petitioner again cited *Donovan* at page 65 of his Brief and Argument of Appellant to the Alabama Supreme Court and argued that a state court cannot enjoin a federal court case.

Petitioner's reference and argument of the *Donovan* principle was not as extensive as in his previously mentioned related and companion cases (cited to this Court by Respondents in their Briefs) because the Alabama Supreme Court was by now very familiar with Petitioner's *Donovan, et al.* challenge and had itself declared that their rejection of *Donovan* was "unequivocal" and that "we adhere to that holding." (*Op. cit.*, 351 So.2d 552 at p. 554).

Respondents' technical assertion that Petitioner has failed to raise the *Donovan* issue timely is simply untrue, and if accepted, would result in unjustly punishing Petitioner in the sum of nearly a quarter of a million dollars solely for exercising his constitutional rights by participation in a federal Civil Rights lawsuit.

II.

Respondents' Argument That the Allmon Civil Rights Action Was an in Rem Action Is Specious and Totally Without Merit.

This Court has declared in *Donovan v. Dallas* (*Op. cit.*) that state courts are without power and authority to enjoin participation in federal *in personam* actions. Respondents cleverly seek to avoid the restraints of *Donovan* by arguing that the *Allmon* civil rights action (*Allmon v. Bookout, et al.*, Civil Action No. 74-377-N, United States District Court for the Middle District of Alabama) was an *in rem* action. Respondents' arguments are specious and the cases cited by them are inapplicable to *in personam* actions.

It is undisputed that the *Allmon* action was filed pursuant to 42 U.S.C. 1981 *et seq.*, and the exclusive jurisdiction granted to the federal courts by 28 U.S.C.

1343. Said action sought *personal liability and money damages* against the defendants.

In addition to the cases and authorities cited by Petitioner in his Petition, 1 *C.J.S.*, Actions, Sec. 52 further clarifies the important distinctions between *in personam* and *in rem* actions:

> "Actions in personam and actions in rem differ in that the former are directed against specific persons and seek personal judgments, while the latter are directed against the thing or property or status of a person and seek judgment with respect thereto as against the world."

The case of *Hutchins v. Pacific Mutual Life Insurance Company*, 20 F.Supp. 50 (S.D. Cal. 1937), affirmed 97 F.2d 58 (9th Cir. 1938), cited by Respondent Payne (Payne Brief, at p. 12) is clearly distinguishable from the *Allmon* case, in that the federal action in *Hutchins* specifically sought the reconveyance of the assets of a state court proceeding. However, in the *Allmon* case substantial monetary damages were sought against individuals as a result of their conspiracy to deprive plaintiff and others of their civil rights. The defendants' conduct in the *Allmon* case, included, among other things, political payoffs, corruption, bribery, and violation of statutes.

Yet, despite the clear *in personam* nature of the *Allmon* case, Respondent Payne argues that the "thrust" of the *Allmon* case was to allegedly "wrest control" of the receivership estate and retry all of the issues using the civil rights statute as a "vehicle" for federal jurisdiction (Payne Brief, at p. 13). Such an assertion is untrue. But, in cases where a state court receivership proceeding is a sham and is fraught with political

and judicial corruption, and bribery, and violates substantial constitutional and civil rights of a party litigant, then, the only recourse that remains is to seek relief in our federal courts by the institution of a federal civil rights action and a claim for monetary damages!

III.

The Subject Civil Contempt Judgments Are Void and Unenforceable in That They Are Based Upon an Unconstitutional State Court Order.

Respondent Protective argues that Petitioner cannot escape liability for his civil contempt of the subject state court injunction, even if said injunction is unconstitutional and void. In support of its argument, Protective erroneously cites this Court's decision in *Walker v. Birmingham*, 388 U.S. 307 (1967). In *Walker* this Court held that in some circumstances a person may be held in *criminal* contempt for disobeying a judicial order that is subsequently found to be void.

Respondents' argument is easily disposed of by this Court's decision in the case of *United States v. United Mine Workers*, 330 U.S. 258 (1947). In the *United Mine Workers* case, this Court declared that a conviction and award of damages arising out of a *civil* contempt must be reversed if the *civil* contempt arises out of a judicial order subsequently found to be unconstitutional. In so ruling, this Court declared:

> "It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order."

This Court continued by stating:

> "The right to remedial relief falls with an injunction which events prove was erroneously issued (citations), and *a fortiori*, when the injunction or restraining order was beyond the jurisdiction of the court." (*Ibid.* 330 U.S. 258, at p. 259).

This Court set aside the civil contempt judgment in the *United Mine Workers* case as Petitioner requests this Court to do in the case at bench.

IV.
Conclusion.

Petitioner recognizes the importance of preserving the dignity and respect of state courts and of their ability to enforce their orders and decrees. However, the power and authority given state courts to enforce their orders plainly was not intended to give a state court the power to nullify the United States Constitution by the simple process of incorporating an unconstitutional prohibition into its judicial decree.

The subject state court order of January 6, 1975, and the civil contempt judgments based thereon are constitutionally infirm, in that they restrain and punish an individual solely because he exercised his constitutionally protected right of seeking redress in the federal courts of the United States for deprivation of his constitutional and civil rights. For these important reasons Petitioner requests that certiorari be granted.

Respectfully submitted,

FREDERICK J. LAWSON,
Law Offices of FREDERICK J. LAWSON,
Attorney for Petitioner.